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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

QUIK PAYDAY INC.,

Petitioner,

– v. –

JUDI M. STORK, in her official capacity as Acting Bank Commissioner, and KEVIN C. GLENDENING, in his official capacity as Deputy Commissioner of the OFFICE OF THE STATE BANK COMMISSIONER, STATE OF KANSAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit err when it held that two or more states may subject the same interstate Internet transaction to conflicting regulations, or did the Second and Fourth Circuits and the Federal Communications Commission err in holding that the "national unity test" to the dormant Commerce Clause protects Internet commerce from such a patchwork of conflicting state regulations?

2. Did the Tenth Circuit err when it held that the putative benefit of subjecting interstate Internet transaction to conflicting state regulations exceeded the burden imposed thereby, or did the Second and Fourth Circuits and the Federal Communications Commission err in holding that the "*Pike* balancing test" to the dormant Commerce Clause protects Internet commerce from such a patchwork of conflicting state regulations?

3. Should this Court's holding that the federal preemption doctrine protects certain Internet commerce from a "patchwork of state service-determining laws, rules, and regulations," *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 996 (2008), be extended to the analogous dormant Commerce Clause?

CORPORATE DISCLOSURE STATEMENT

Petitioner Quik Payday Inc. ("Quik Payday") has no parent corporation. No publicly held corporation owns 10% or more of Quik Payday's stock.

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JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on December 12, 2008. This Court has jurisdiction to consider this petition under 28 U.S.C. § 1254(1). The Court of Appeals exercised its jurisdiction under 28 U.S.C. § 1291. The United States District Court for the District of Kansas exercised its jurisdiction under 28 U.S.C. § 1233.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

Article I, Section 8 of the United States Constitution states in part, "[t]he Congress shall have the power ... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes ...."

Statutory Provisions

The Kansas Uniform Consumer Credit Code is contained in Kansas Statute § 16a-1-101, *et. seq*.

16a-1-201. (UCCC) Territorial application.

(1) Except as otherwise provided in this section, K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, apply to consumer credit transactions made in this state. For purposes of such sections of this act, a consumer credit transaction is made in this state if:

(a) A signed writing evidencing the obligation or offer of the consumer is received by the creditor in this state; or

(b) the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means.

...

(*See* complete text of statute at A-59.)

STATEMENT OF THE CASE

This action arises from an unconstitutional effort by the State of Kansas to project its laws beyond its borders, by imposing regulations that amount to a practical ban against interstate Internet lending. Kansas' Acting and Deputy Bank Commissioners ("Respondents") have fined Quik Payday $5 million, ordered it to return all the fees it has collected over several years, and banned it from all lending within the state, merely for having made Internet consumer loans to Kansas residents – from the State of Utah and in full compliance with Utah law. The dormant Commerce Clause to the Constitution, as defined through a century and a half of jurisprudence, reserves for Congress exclusive control of such interstate commerce.

Kansas citizens have always had the right to drive across state lines and take out loans from other states' lenders, free of Kansas law. The issue presented herein is whether the advent of the Internet empowers Respondents to do something that Constitutionally they were never able to do before – namely, regulate an out-of-state lender. The answer is critical to the future of Internet commerce. If every state is permitted to regulate Internet commerce as aggressively as Kansas has done, there eventually will be little business left to regulate.

Accordingly, Quik Payday submits this Petition for a Writ of Certiorari. The following facts are relevant to the Court's analysis of this Petition.

The Internet

"The Internet is a decentralized, global medium of communication that links people, institutions, corporations and governments around the world. It is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers." *ACLU v. Johnson*, 194 F.3d 1149, 1153 (10th Cir. 1999). One research report estimates that approximately one billion persons worldwide soon will have access to the Internet. *See* Siobhan Chapman, *Worldwide PC Numbers to Hit 1B in 2008, Forrester Says*, CIO, June 11, 2007. An earlier report by the same analytical firm estimated that Internet commerce had already reached $6.8 trillion dollars as of 2004. *See* Forrester Research, *Forrester Findings: Worldwide eCommerce Growth,* Feb. 2002).

Payday Lending

This case centers on one part of Internet commerce: online "payday loans." Payday lenders make small, short-term loans to mostly moderate income households excluded from access to more traditional lines of credit. A typical payday loan is about $300 for two weeks. Prior to the advent of the Internet business model, a payday lender would typically ask for two recent pay stubs as proof of employment, along with a recent bank account statement. The borrower would typically secure the loan with a post-dated personal check for the loan amount plus fees. When the loan matured, the lender would deposit the post-dated check. On the Internet, essentially the same process is effected with no paper exchange, but rather through the use of bank

account and routing numbers and the wire transfer of funds. *See* Bair, Sheila, *Low-Cost Payday Loans: Opportunities and Obstacles*, Baltimore: The Annie E. Casey Foundation, 2005.

When expressed in terms of annual percentage rates, the costs associated with payday loans appear high, and so tend to draw criticism. However, these are numbers generated from mere $20 finance charges. As the Online Lenders Alliance explained in its *amicus curae* brief filed in the proceedings below, using an annualized percentage calculation for a two-week loan is inappropriate and unhelpful. Just as no one would use a taxi service to travel cross-country, or choose short-term parking at the airport for a month-long trip, no one takes out a payday loan for a 12-month term. Applying this same metric, credit cards charge 700% or more, and even a $1.44 ATM fee amounts to 526% APR.

In fairness, such rates also must be compared to the very high non-sufficient fund (NSF) fees that such households pay for bounced checks, retail service charges for returned checks, and late fees for missed rent or utility payments. In 2003, consumers paid banks $22 billion in NSF fees and $57 billion in late fees. Payday loans help consumers avoid those needless costs, and the corresponding damage to their credit scores. One recent study has even found that "payday credit can be profoundly beneficial, even lifesaving, in extraordinary events." Donald P. Morgan and Michael R. Strain, Federal Reserve Bank of New York, *Payday Holiday: How Households Fare after Payday Credit Bans* (Nov. 2007), at 6.

Quik Payday

Quik Payday was formed for the purpose of offering payday loans exclusively over the Internet. It is far more convenient to arrange a loan over the Internet than from a retail office in a face-to-face transaction, and online loan applications also allow for discreet transactions. From 1999 through 2006, Quik Payday engaged in lending transactions with consumers in dozens of states, including 972 consumers listing a Kansas residential address on their loan applications.

To say that Quik Payday made loans to a Kansas resident does not mean that a Kansas resident actually applied for the Quik Payday loan over the Internet via a computer located within the borders of Kansas. To be a Kansas "consumer" for purposes of the Kansas Uniform Consumer Credit Code, one need only list a Kansas address "in any writing signed by the consumer in connection with a credit transaction." Kan. Stat. Ann. § 16a-1-201(6). To cite just one possibility, in the 2000 Census, some 78,293 Kansas residents reported working in the Kansas City, Missouri metro area. *See* U.S. Census Bureau, *County-to-County Worker Flow Files* (2000). It is entirely possible for such persons to have applied for payday loans from computers in their workplaces rather in their homes.

While the borrowers' locations may be indeterminable, Quik Payday's location certainly was not. It operated its Internet lending business solely from its offices in Logan, Utah. It does not now have – nor has it ever had – any offices, employees, or other physical presence in Kansas. All of its loan

applications, loan contracts, and loan payments were received and processed in Utah. All loans were underwritten and approved in Utah, and all records relating to Quik Payday's lending activities were maintained in Utah. Furthermore, Quik Payday never availed itself of Kansas jurisdiction by filing suit in connection with a loan made to a consumer with a Kansas address.

Quik Payday has never contended that it has a right to operate free of all regulation. Rather, throughout the entire period of its operation, Quik Payday was fully licensed by the State of Utah, under Utah's Check Casher statute, to make payday loans to consumers. Respondents have not alleged in this matter that Quik Payday is acting in violation of Utah law in any respect.

Utah's Regulation Of Lenders

This Court may take judicial notice of the fact that Utah maintains a comprehensive regulatory scheme over its lenders. Utah, like Kansas, permits payday lending. *See* Utah Code Ann. §7-23-101 *et seq.*, Kan. Stat. Ann. § 16a-1-101 *et seq.* Utah and Kansas both have adopted versions of the Uniform Consumer Credit Code, which protects consumers from unfair and misleading credit practices. *See id.*; Utah Code Ann. § 70C-1-101 *et seq.* The Utah Department of Financial Institutions regulates and annually examines Utah-based lenders, including state-chartered depository institutions and deferred deposit lenders. *See* Utah Code Ann. § 7-23-107. The Utah Banking Act also provides consumers a similar remedy to Kansas laws, in that any Kansas citizen with a complaint against Quik Payday can contact a

Utah regulator. *See* Utah Code Ann. § 7-23-106. Utah regulators, in turn, like Kansas regulators, have the power to resolve any unlawful or improper action by the lender that might occur. *Id.*

1999 Amendment To Kansas Consumer Credit Code

For most of the State's history, Quik Payday's Utah-based lending would have been of no interest to Kansas. In 1999, however, in response to "concern over the growing use of the Internet," Kansas revised its Consumer Credit Code (the "KCCC") to expressly cover Internet lending transactions between out-of-state lenders and persons claiming Kansas residences – regardless of where those transactions actually take place. *See* 2000 Comment to Kan. Stat. Ann. § 16a-1-201 (the "Official Comment"). Specifically, prior to 1999, the KCCC applied only to consumer credit transactions "made in this state." Kan. Stat. Ann. § 16a-1-201 (A-59, emphasis added). In that year, however, the Legislature expanded the words "in this state" to include transactions outside the state, where "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including ... electronic means." Kan. Stat. Ann. § 16a-1-201(1)(b) (the "1999 Amendment").

The 1999 Amendment laid the groundwork for Kansas regulators to forge into new areas of interstate commerce. The Official Comment to the 1999 Amendment conveys exactly how radical and aggressive was the expansion of Kansas' regulatory power authorized by the 1999 Amendment:

KANSAS COMMENT, 2000

...

2. Under the original version of subsections (1) and (2) of this section, the issue of whether a transaction was deemed to have been made in Kansas ... was dependent on the place at which the executed contract was received by the creditor and whether any face-to-face solicitations occurred in Kansas. As a result, creditors had a measure of control over the applicability of the U3C [the Kansas Uniform Consumer Credit Code] to their transactions and could arrange their interstate operations in a manner that minimized the operational difficulties arising from the variations in the laws of different states. This flexibility on the part of creditors ... offered no threat to consumers because the CCPA [the Kansas Consumer Credit Protection Act] assured consumers that disclosure requirements would be substantially similar in all states.

Subsection (1)(b) was amended, however, in the 1999 legislative session to remove the "face-to-face" qualifier from the solicitation test. This amendment was driven primarily by a concern over the growing use of the Internet as a means of soliciting Kansas consumers to enter into credit transactions with out-of-state creditors. **However, this seemingly innocuous amendment sweeps well beyond the Internet and, if given an expansive interpretation, could have enormous potential consequences for out-of-state creditors.**

Under amended subsection (1)(b), the applicability of the U3C to a multi-state transaction turns on whether there is "solicitation in this state." No guidance is given on when a solicitation is made in Kansas or what role any solicitation that is deemed to have been made in Kansas must have played in the consumer's decision to enter into the transaction. ...

It seems quite unlikely that a Kansas resident will locate an out-of-state creditor, travel to the creditor's state and consummate a consumer credit transaction with that creditor unless the creditor has "solicited" the consumer by the use of targeted telephone, mail or other direct marketing or general radio, television, or other non-individualized advertisements received or seen by the consumer in Kansas. Thus, as a practical matter, nearly all consumer credit extended by out-of-state creditors to Kansas residents would be deemed to have been made in Kansas if an expansive interpretation is given to amended subsection (1)(b). Under such an interpretation, the entire U3C (including its licensing requirements, its disclosure requirements and its substantive limitations) would apply to those transactions. As a result, much of the remainder of this section would be rendered surplusage – there simply would be precious few transactions that slip past the broad net cast by such an interpretation of amended subsection (1)(b).

...

> 4. Creditors falling within the supervised lender category (part 3 of article 2) need to be licensed only in the state where the loan is made. As noted in Kansas comment 2 to this section, however, under an expansive interpretation of amended subsection (1)(b) virtually all supervised loans extended to Kansas residents would be deemed to have been made in Kansas and, as a result, out-of-state creditors extending those loans would need a Kansas supervised lender's license. ...

2000 Comment to Kan. Stat. Ann. § 16a-1-201 (emphases added) (A-63-65).

In short, this is not an example of mere incidental regulation of Internet commerce. Rather, the whole purpose of the 1999 Amendment was to regulate interstate Internet commerce. As Respondents conceded below, the Kansas Legislature enacted the 1999 Amendment because it was "concerned about loans made over the internet by out-of-state lenders to Kansas borrowers."

Kansas' Summary Order

The concerns expressed by the author of the Official Comment have now been realized. Respondents have adopted the most extreme, expansive reading of the 1999 Amendment imaginable, and have used it to bring the full might of the State of Kansas down upon Quik Payday, a lawful and licensed Utah lender making loans from Utah. On March 13, 2006, the Kansas Banking

Commission issued the Summary Order described above, fining Quik Payday $5 million, and ordering it to cease all lending activities in Kansas.

Specifically, the Kansas Banking Commission, after receiving only a single complaint from one of Quik Payday's customers, issued to Quik Payday a "SUMMARY ORDER TO CEASE AND DESIST, PAY A CIVIL PENALTY (FINE), TO BAR FROM FUTURE APPLICATION FOR LICENSURE, AND TO PAY RESTITUTION FOR VIOLATIONS" (the "Summary Order") (A-49) Although payday lending is legal in Kansas, the Commission nevertheless took the position that Quik Payday's failure to become licensed in the State of Kansas, even though it was already licensed in the State of Utah, warranted severe sanctions. Namely, the Summary Order directed that Quik Payday:

> ... immediately cease and desist engaging in the business of making, and/or undertaking direct collection of payments from, supervised loans, as defined by K.S.A. 2005 Supp. § 16a-1-301(46) with Kansas consumers. All signage for payday loans/advances to Kansas consumers must be removed and any advertisements, including electronic internet solicitation, must be withdrawn from circulation.
>
> ... pay a civil penalty (fine) in the amount of $5,000,000.00 made payable to the Kansas Office of the State Bank Commissioner.
>
> ... be barred from future application for licensure as a supervised lender pursuant to the Code.

> ... pay restitution to 972 Kansas consumers in the form of refunding all profits and/or interest or service fees received as the result of engaging in the business of making and/or undertaking direct collection of payments from at least 3,077 supervised loans, as defined by K.S.A. 2005 Supp. § 16a-1-301(46), with these 972 Kansas consumers, and shall pay interest to these 972 Kansas consumers on all said profits and/or interest or service fees at the rate of 8% per annum from May 11, 2001. ...(A-54-55)

Prior Proceedings

Quik Payday timely sought a hearing with the Office of the State Bank Commissioner, and, after the instant action was filed, the administrative proceeding was stayed pending the outcome of this suit. Since the Summary Order issued, Quik Payday has shut down. On May 19, 2006, Quik Payday filed the instant lawsuit with the United States District Court for the District of Kansas, asserting, *inter alia*, violations of the Commerce Clause and alleging that § 16a-1-201 of the KCCC is unconstitutional.

In its suit, Quik Payday sought: (a) a declaration that the 1999 Amendment, Kan. Stat. Ann § 16a-1-201(1)(b), both on its face and as applied by Respondents to Quik Payday, violates the United States Constitution; and (b) an injunction permanently enjoining Respondents from enforcing the Summary Order or otherwise seeking to impose Kansas regulatory requirements on Quik Payday's Utah lending activities.

The basis for Quik Payday's Constitutional objection was and is the Constitution's Commerce Clause. Specifically, this Court has explained that the Commerce Clause "has a negative sweep ... [which] prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). This has come to be known as the "dormant" Commerce Clause. *Id.* Among other things, the dormant Commerce Clause means that: "no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (emphasis added). That is because the practical effect of permitting such regulation would be "to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.* The issue now before this Court is whether the fifty states can constitutionally regulate the manner by which out-of-state parties conduct themselves on the Internet, and thereby export their policies beyond their respective borders.

Both sides ultimately moved for summary judgment. On these cross motions for summary judgment, the District Court granted Respondents' motion and denied Quik Payday's motion. (A-25) Quik Payday appealed. On December 12, 2008, the Court of Appeals affirmed the judgment of the District Court. (A-1) The bases for the Court of Appeals' decision are examined below.

REASONS FOR GRANTING THE PETITION

The subject of this Petition is the decision by the United States Court of Appeals for the Tenth Circuit that the State of Kansas may impose its own layer of conflicting regulations on interstate Internet loan transactions made by Quik Payday from the State of Utah without violating the dormant Commerce Clause. *See Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008) (A-1). With its decision, the Tenth Circuit has: (a) undermined Congress' authority to regulate interstate commerce; (b) contradicted authorities from the Second and Fourth Circuit Courts of Appeals and other jurisdictions; and (c) disregarded the clear teaching of this Court that interstate Internet commerce should be maintained free of a "patchwork of state service-determining laws, rules, and regulations." *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 996 (2008).

This decision has implications far beyond just Internet lending. The Second and Fourth Circuits have already applied the dormant Commerce Clause analysis rejected by the Tenth Circuit to Internet information providers (*see Am. Booksellers Found.* and *Psinet, infra*) and the Federal Communications Commission has applied the same analysis to an Internet telephone provider (*see Vonage, infra*). The Tenth Circuit's contrary decision now jeopardizes the future growth of interstate Internet commerce. Accordingly, in order to address this important federal issue, resolve the split in the Circuits, and extend this Court's *Rowe* holding from the preemption doctrine to the analogous dormant

Commerce Clause, Quik Payday respectfully requests that its Petition for a Writ of Certiorari be granted.

I. THE EXTENT TO WHICH STATES MAY REGULATE INTERSTATE INTERNET COMMERCE IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT

This Court has long recognized that certain types of commerce require national regulation. 194 F.3d at 1161. As long ago as 1886, this Court confronted state regulation of the nation's railways:

> Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible.

Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557, 574-75 (1886) (emphasis added). This Court therefore struck the Illinois statute at issue, which purported to establish interstate railway rates, stating "that this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and regulations, we think is clear from what has already been said." *Id.* at 577.

By the middle part of the twentieth century, rail had given way to highways as the principal medium of interstate commerce, and this Court had to confront state regulation there as well. In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), the Court examined an Illinois statute that required the use of contour mudguards on trucks in Illinois. The Court took note of the fact that straight or conventional mudguards were permissible in most other states and actually required in Arkansas. *Id.* at 526. Recognizing the need for coordinated legislation, the Court held that "the conflict between the Arkansas regulation and the Illinois regulation ... suggests that this regulation of mudguards is not one of those matters admitting of diversity of treatment, according to the special requirements of local conditions." *Id.* at 528 (citation omitted). This Court struck the Illinois law as unconstitutional. *Id.*

In the oft-cited case *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997), the United States District Court for the Southern District of New York concluded the foregoing dormant Commerce Clause precedents of this Court should now be extended to the Internet: "The Internet, like the rail and highway traffic at issue in the cited cases, requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.'" (Emphasis added); *see also* Kenneth D. Bassinger, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 Ga. L. Rev. 889, 904 (Spring 1998) ("The structure of the Internet bears a striking resemblance to a railroad, highway, or other means of interstate transportation.")

The reason uniformity is so important in the Internet sector, as explained in *Pataki*, is because: "Regulation on a local level ... will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities." 969 F. Supp. at 182. Accordingly, "[t]he menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation – and in particular, the national infrastructure of communications and trade – as a whole." *Id.* at 169, citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992).

If any case ever raised such a specter, this one does. No two states regulate payday lending identically. In a table appended to its opening summary judgment brief to the District Court (A-75), Quik Payday set forth a summary of the laws governing payday lending in the fifty states. If every state can now regulate not just its own lenders (as Kansas did through 1999), but also Internet lenders beyond its borders (as Kansas now purports to do), then the individual state power to regulate interstate commerce over the Internet will have become so great as to threaten the viability of the Internet as a practical medium for conducting many diverse forms of business, not just lending.

Perhaps that is Respondents' goal, but it is not their judgment to make. The Constitution leaves that decision to Congress. Until Congress enacts uniform rules for Internet lending, the states should not fill the void, but rather should limit their regulations to their own lenders. Quik Payday

respectfully requests that this Court grant a Writ of Certiorari to consider this important federal question.

II. THE TENTH CIRCUIT'S RULING CREATES A SPLIT AMONG CIRCUIT COURTS OF APPEAL ON THIS IMPORTANT FEDERAL QUESTION

In *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169-83 (S.D.N.Y. 1997), the Southern District of New York invalidated a New York statute under three separate tests of the dormant Commerce Clause, each of which was sufficient by itself to establish unconstitutionality: (1) "[The Act] Seeks To Regulate Conduct Occurring Outside its Borders"; (2) "The Burdens the Act Imposes on Interstate Commerce Exceed Any Local Benefit"; and (3) "The Act Unconstitutionally Subjects Interstate Use of the Internet to Inconsistent Regulations."

The Second and Fourth Circuits, the Federal Communications Commission, and several District Courts have all expressly adopted the *Pataki* three-prong test, and applied it to invalidate state regulations which unduly interfere with interstate Internet commerce. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (invalidating Vermont child protection statute under dormant Commerce Clause); *Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (invalidating Virginia child protection statute under dormant Commerce Clause); *In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, 22430 (Nov. 12, 2004) (invalidating Minnesota telephone regulation under dormant Commerce Clause).

The Tenth Circuit originally followed *Pataki* as well. *See ACLU v. Johnson*, 194 F.3d 1149, 1160-61 (10th Cir. 1999). By its Opinion in this case, however, the Tenth Circuit has now retreated from this emerging consensus, and rejected almost any dormant Commerce Clause protection for Internet commerce. Below, Quik Payday examines this new split in the Circuits, focusing on the second and third prongs of the three-prong *Pataki* analysis.

A. NATIONAL UNITY TEST

The split in the Circuits is particularly dramatic with respect to the third prong of the Pataki test, commonly referred to as the "national unity test." The first Circuit Court to adopt *Pataki's* dormant Commerce Clause analysis was the Second Circuit in *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003). In that case, the Court of Appeals expressly affirmed the national unity test, holding that: "We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they imperatively demand[] a single uniform rule." *Id.* at 104 (citation omitted, emphasis added). The Fourth Circuit promptly followed suit. *See Psinet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir. 2004) (discussed below).

Consistent with these two Circuit Court precedents, the Federal Communications Commission (FCC) in *In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, 22430 (Nov. 12, 2004) struck down a Minnesota regulation of Internet telephony on Commerce Clause grounds. The FCC held that: "requiring Vonage to submit to more than 50

different regulatory regimes ... would eliminate this fundamental advantage of Internet-based communication." It further explained: "While states can and should serve as laboratories for different regulatory approaches, we have here a very different situation because of the nature of the service – our federal system does not allow the strictest regulatory predilections of a single state to crowd out the policies of all others for a service that unavoidably reaches all of them." *Id.* at 22428; *accord, e.g., Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 661-63 (E.D. Pa. 2004); *Cyberspace Communs., Inc. v. Engler*, 55 F. Supp. 2d 737, 751-52 (E.D. Mich. 1999).

The Tenth Circuit originally adopted the same national unity test as the Second and Fourth Circuits, FCC and District Courts above. Specifically, in *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999), the Court held that:

> The third ground upon which the district court held section 30-37-3.2(A) violates the Commerce Clause is that it subjects the use of the Internet to inconsistent regulations. As we observed, supra, certain types of commerce have been recognized as requiring national regulation. *See, e.g., Wabash, St. L. & P. Ry. Co.*, 118 U.S. 557 at 574-75, 7 S. Ct. 4, 30 L. Ed. 244 (noting that "commerce with foreign countries and among the states" requires "only one system of rules, applicable alike to the whole country"). The Internet is surely such a medium. We agree with the court in Pataki, when it observed, "the Internet, like ... rail and highway traffic ..., requires a cohesive national scheme of

> regulation so that users are reasonably able to determine their obligations." *Pataki*, 969 F. Supp. at 182....

In *Johnson*, the Tenth Circuit struck down a New Mexico law regulating Internet pornography. When it came time to decide the instant case, however, the Court reversed its position and declared that "Quik Payday reads too much into these statements [from *Johnson*]." 549 F.3d at 1311 (A-20). Suddenly, there was no longer any separate national unity test to the dormant Commerce Clause:

> Although Quik Payday treats the need for national uniformity as an additional ground for determining that a state law violates the Commerce Clause, concerns about national uniformity are simply part of the Pike burden/benefit balancing analysis. ...
>
> ... To the extent that [Quik Payday] also argues what it terms the "national unity" test, we will treat that issue as part of the balancing process.

549 F.3d at 1307-08 (A-11-12).

In applying its new, trimmed-down dormant Commerce Clause analysis, the Tenth Circuit came to the conclusion that the Internet pornography at issue in *Johnson* is more critical to Interstate commerce than consumer lending. "Our concern [in *Johnson*] was that the statute would govern websites, bulletin-board services, and chat rooms, which can be accessed by virtually anyone, anywhere, without control by the one posting the information. ... If such a posting were subject to New

Mexico law, it would be equally subject to the laws of every jurisdiction in which the Internet operated. ... Such a regulatory regime could obviously cripple that medium of communication." 549 F.3d at 1312 (A-21).

Although the issue was the Commerce Clause, the Tenth Circuit held that Internet consumer lending is not entitled to the same level of Constitutional protection as Internet chat rooms. "Regulation of one-to-one commercial exchanges via the Internet ... is quite a different matter. The potential for multiple jurisdictions to regulate the same transaction is much more limited." 549 F.3d at 1312 (A-21). It mattered not that Quik Payday had just been fined $5 million and driven out of business as a direct consequence of multiple jurisdictions – Utah and Kansas – trying to regulate the same series of loan transactions.

And that is just the actual multi-state regulation. The potential for multiple jurisdictions to regulate the same transaction is far, far greater. For example, suppose a consumer who lives in Kansas and works in Missouri checks her email at home and receives a solicitation for a payday loan from an online lender licensed and operating in Utah. The next day, from her office computer, she submits the application via the Internet listing her Kansas home address on the application. That same day in Utah, the application is reviewed, approved and processed. Under the Tenth Circuit's view of the world, three states – Utah, Missouri, and Kansas law – could all claim the right to regulate that one loan, and the lender would need to become licensed in each state, just to make that single loan. *See, e.g.,* Kan. Stat. Ann. § 16a-1-201(1); Utah Code Ann. § 7-23-103(1)(a).

But the licensing issue – the only type of regulation addressed by the Court of Appeals, to the exclusion of all others – is just the start of the problem. Suppose at the end of the term, the consumer cannot repay the loan in full and wants to roll it over. She goes to her computer at work in Missouri and, via the Internet, requests a rollover from her Utah lender. Kansas prohibits rollovers, Missouri allows up to six rollovers but caps the amount of fees and interest at 75% of the original loan amount, and Utah prohibits rollovers beyond twelve weeks after the loan agreement is executed. *See* Kan. Stat. Ann. § 16a-2-404; Mo. Rev. Stat. § 408.500.6; Utah Code Ann. § 7-23-105(1)(c). Which jurisdiction's regulation would apply?

Other states' regulations are similarly inconsistent; indeed, many are all but impossible to reconcile. For example, Oklahoma consumers have a right to an installment repayment plan in certain situations. *See* Okla. Stat. tit. 59 § 3109.D. Similarly, Alaska requires that upon default, but before assigning the account to a collection agency, the lender shall attempt in good faith to contact the customer and offer a payment plan. *See* Alaska Stat. § 06.50.550. In contrast, Nebraska forbids lenders to "[r]enew, roll over, defer, or in any way extend a delayed deposit transaction by allowing the maker to pay less than the total amount of the check and any authorized fees or charges." Neb. Rev. Stat. § 45-919(f). Which state's laws should the lender comply with, and which must it violate?

These sorts of inconsistent multi-state regulations operate as a functional bar to the development of an Internet-based, national lending industry. Yet the Tenth Circuit declined to grapple with the issues raised by its split from the other Circuits. Instead, it simply dismissed all the uncontested evidence of inconsistent regulation as "hypothetical," focusing instead on the cost of obtaining a Kansas license, and stating that "we need not concern ourselves with provisions that have never been applied to Quik Payday (and which, because Quik Payday no longer operates as a payday lender, never will be)." 549 F.3d 1310 (A-16).

The Court of Appeals did acknowledge in passing that such regulatory conflicts might create Constitutional issues, but then chose to leave the issue for another day. *See* 549 F.3d 1310 (A-23) ("If some future Internet payday lender were to point to potential inconsistency among the states in some other component of the KUCCC – say the handling of renewals – then a court could address whether the Commerce Clause bars this type of regulation.").

By limiting the judicial inquiry to only the respective benefits and burdens of obtaining a license, the Tenth Circuit avoided the difficult question of what happens when a lender, in order to consummate an Interstate loan transaction, is forced to obtain licenses from two or more states with irreconcilable lending laws. The Tenth Circuit's new approach puts lenders in a Catch-22. Essentially, the Court held that an Internet lender must first obtain licenses from each of the states implicated in an interstate loan transaction, and then complete the loan, by necessity violating one state or the other

state's laws, before the Court would consider the Constitutionality of the regulation. In the real world, Internet lenders will simply abandon the multistate lending model before they set about knowingly violating laws in order to create test cases for Constitutionality.

The current split between the Second and Fourth Circuits, on the one hand, and the Tenth Circuit, on the other hand, concerning the dormant Commerce Clause's national unity test, has frustrated the development of an Internet-based, national lending industry. With a liquidity crisis now upon us, the time has come for consumer lending to be accorded the same level of Commerce Clause protection as web chat rooms. Quik Payday therefore respectfully requests that its Petition be granted, so that this split in the Circuits may be addressed.

B. *PIKE* BALANCING TEST

The Tenth Circuit's decision also creates a split in the Circuits with respect to the "*Pike* balancing test." This second dormant Commerce Clause test requires "a two-fold inquiry. The first level of examination is directed at the legitimacy of the state's interest. The next, and more difficult, determination weighs the burden on interstate commerce in light of the local benefit derived from the statute." *Pataki*, 969 F. Supp. at 177, citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). State regulations that "directly burden interstate commerce ... are generally struck down unless the state can demonstrate that a legitimate local interest unrelated to economic

protection is served by the regulation." *Kleenwell Biohazard Waste & Gen. Ecology Consultants v. Nelson*, 48 F.3d 391, 395 (9th Cir. 1995).

Before a state may enact regulations which burden interstate commerce, the "legitimate local interest" must be proven – not merely declared. That point was made clear by the Fourth Circuit in *Psinet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004). Striking down a Virginia statute, the Court of Appeals found it to "be an invalid indirect regulation of interstate commerce because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers. ... There is no question that Virginia has a compelling interest in protecting the physical and psychological well-being of minors. The local benefits of such a statute, however, have not been proven." *Id.* at 240 (emphasis added).

The Fourth Circuit's application of the *Pike* balancing test to Internet commerce – and, in particular, the requirement of actual proof – was consistent with this Court's dormant Commerce Clause jurisprudence in other sectors of the economy. In *Granholm v. Heald*, 544 U.S. 460, 490 (2005), for example, this Court held that fixing an unproven problem of minors ordering wine over the Internet did not overcome an otherwise unconstitutional burden on interstate commerce:

> The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with

> minors' increased access to wine .... Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions.

(Citation omitted).

Consistent with the foregoing, the Tenth Circuit originally required actual proof of a corresponding benefit before it let a state burden interstate Internet commerce. In *Johnson*, the Court of Appeals agreed that protection of minors is "an undeniably compelling governmental interest," yet still found that the means New Mexico chose to further that compelling interest (Internet regulation) unconstitutionally burdened interstate commerce. 194 F.3d at 1161.

If the regulatory burden on Internet commerce outweighs a state's interest in protecting children from pornography, it might also outweigh a state's interest in protecting adults from credit. Yet when it came time to decide the instant case, the Tenth Circuit accepted the Respondents' claims of a regulatory benefit at face value, pointing only to things like background and credit checks which Utah requires just like Kansas. *See* 549 F.3d at 1312 (A-28); Utah Code Ann. § 7-1-704. No evidence of any kind was proffered, or required.

It should be noted that Quik Payday as a Utah corporation was already compliant with the extensive lending regulations of the State of Utah, which, like Kansas' regulations, are based on the Uniform Codes promulgated by the National Conference of Commissioners on Uniform State

Laws. *See* Uniform Consumer Credit Code, Prefatory Note (1974); Utah Code Ann. §7-23-101 *et seq.*, Kan. Stat. Ann § 16a-1-101 *et seq.* The Tenth Circuit, however, ignored Utah law entirely. It never found any difference between Utah and Kansas law such that piling on a second layer of regulations was necessary to further the state's interest. Nor did it find that those, at most, incremental putative benefits would outweigh the significant burdens of such a multi-state regime.

It is reasonable to infer that Kansas's purpose in adding a second tier of inconsistent regulations on top of Utah's was to make it all but impossible for Quik Payday and other Internet lenders to do business in the state. If so, then Respondents put forward no evidence that this achieved any local benefit either. As noted above, the Federal Reserve Bank of New York has surveyed the economic data and found that restrictions on payday lending actually harm the moderate-income consumers such laws purport to protect, because they limit consumers' access to credit and thus increase their exposure to bounced check fees, late charges and damaged credit scores from unpaid bills. Indeed, if payday loans effected half the evil detractors claim, one presumes Congress would have stepped in and enacted uniform regulations for such loans, just as it has done for members of the military. *See* 10 U.S.C. § 987.

In any event, it is highly unlikely that Kansas' banning of online payday lending will eliminate such online lending in Kansas. At most, it will simply drive such business off shore. *See, e.g.*, Credit Slips: A Discussion On Credit And Bankruptcy, *Exporting*

Payday Loans (Nov. 20, 2006) (noting proliferation of Internet payday lenders in Costa Rica and Grenada). In short, there is little if any demonstrable benefit from what Kansas has done to Quik Payday.

On the other side of the *Pike* balancing test, however, the burden is considerable. In its submission to the District Court (A-75), Quik Payday identified the diverse, often grossly inconsistent, laws governing payday lending in the fifty states. Among other things, nine of the states in which Quik Payday consumers claim residence require lenders to maintain a physical office in the state – a restriction which by itself eviscerates the principal economic benefit of operating as an Internet lender. Five states require lenders to maintain a copy of their books and records in the state, while thirty-four others require lenders to pay an administrative agent to travel to the lenders' home office to inspect the books and records. And almost every state requires its lenders to post a sizable surety bond and pay various fees.

That evidence was all before the Tenth Circuit in this case, and yet all that Court had to say was that "Our review of those laws raises doubts about the merits of Quik Payday's argument." 549 F.3d at 1312 (A-22). The Court of Appeals mistakenly assumed that the only cost Quik Payday would have incurred in submitting to Kansas licensing was $925 in annual fees. 549 F.3d at 1310 (A-17). This ignores entirely the substantial regulatory burden that would be imposed on Quik Payday if the KCCC applies to out-of-state lenders. If Kansas can take the position it can regulate out-of-state lending, then so can every other state. As discussed above, the true

burden would not be the cost of obtaining up to fifty licenses, but rather the cost, once those licenses have been obtained, of having to comply with the conflicting, sometimes mutually inconsistent laws of two or more states for each and every interstate transaction.

Such regulatory burdens must be considered. As this Court explained in *Morgan v. Virginia*, 328 U.S. 373, 380 (1946), in the context of the railroads: "Burdens upon commerce are those actions of a state which directly impair the usefulness of its facilities for such traffic. That impairment, we think, may arise from other causes than costs ...." (Citation omitted).

Accordingly, Quik Payday respectfully requests that its Petition be granted, so that this Court may address the split in the Circuits as to the application of *Pike* balancing to interstate Internet commerce.

III. THIS COURT'S *ROWE V. NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION* HOLDING SHOULD BE EXTENDED TO THE DORMANT COMMERCE CLAUSE

Following the completion of briefing on Quik Payday's appeal to the Tenth Circuit, this Court issued its decision in *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989 (2008). Pursuant to Federal Rule of Appellate Procedure 28(j), Quik Payday submitted a letter to the Court of Appeals advising it of this important new precedent, and advocating its relevance. The Court of Appeals ultimately chose not to address the *Rowe* decision at all in its Opinion.

Quik Payday respectfully submits that the Court of Appeals' disregard for this precedent was in error. In *Rowe v. N.H. Motor Transp. Ass'n*, this Court confronted a Maine measure designed "to prevent youth access to tobacco," in light of the "ease with which tobacco products can be purchased through the Internet." 128 S. Ct. at 999. Specifically, Maine enacted legislation forbidding anyone other than a Maine-licensed tobacco retailer from shipping cigarettes into the state, and requiring that such licensed retailer use only delivery services that employed a special kind of recipient-verification service to ensure that the recipient was not a minor. *Id.* at 993-94 (citing Me. Rev. Stat. Ann., Tit. 22, § 1555-C).

Several transport carrier associations brought suit in federal court, citing to a federal statute pre-empting state regulation of interstate motor carriers. 128 S. Ct. at 994 (citing 49 U.S.C. § 14501(c)(1)). Maine responded that its regulation was directed only toward shippers, and would impose "no significant additional costs upon carriers." *Id.* at 996. This Court ultimately rejected that argument, holding that even were it correct, it would be "off the mark." *Id.*

As this Court explained:

> To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is

> inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.

128 S. Ct. at 996 (emphases added).

In *Rowe*, this Court was addressing the preemption doctrine. However, the same state regulatory patchwork is implicated here, under an analogous dormant Commerce Clause context. Subjecting Internet commerce to inconsistent state regulation is unconstitutional. *Rowe* supports that result. Quik Payday therefore respectfully requests that this Court grant a Writ of Certiorari to extend this Court's holding in *Rowe* to the analogous dormant Commerce Clause.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

FILED
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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

QUIK PAYDAY, INC., Plaintiff - Appellant, v. JUDI M. STORK, in her official capacity as Acting Bank Commissioner; KEVIN C. GLENDENING, in his official capacity as Deputy Commissioner of the Office Of The State Bank Commissioner, State Of Kansas, Defendants - Appellees.	No. 07-3289
AMERICANS FOR TAX REFORM; ONLINE LENDERS ALLIANCE, Amici Curiae.	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. NO. 2:06-CV-02203-JWL)

Daniel V. Folt, Duane Morris, LLP, Wilmington, Delaware (Matt Neiderman, Duane Morris, LLP, Robert J. Hoffman and Jeremiah J. Morgan, Bryan Cave LLP, Kansas City, Missouri, with him on the briefs), for Plaintiff - Appellant.

Adrian E. Serene, Staff Attorney (Jacob D. McElwee, Staff Attorney, on the brief), Office of the State Bank Commissioner, Topeka, Kansas, for Defendants - Appellees.

Richard P. Bress and Melissa B. Arbus, Counsel for Online Lenders Alliance, Latham & Watkins LLP, Washington, DC., and Cleta Mitchell, Counsel for Americans for Tax Reform, Foley & Lardner, LLP, Washington, DC, filed an amicus curiae brief for Online Lenders Alliance and Americans for Tax Reform.

Before **HARTZ, HOLLOWAY**, and **ANDERSON**, Circuit Judges.

HARTZ, Circuit Judge.

Quik Payday, Inc., which used the Internet in making short-term loans, appeals from the district court's rejection of its constitutional challenge to the application of Kansas's consumer-lending statute to

those loans. Defendants were Judi M. Stork, Kansas's acting bank commissioner, and Kevin C. Glendening, deputy commissioner of the state's Office of the State Bank Commission (OSBC), both in their official capacities.

Quik Payday argues that applying the statute runs afoul of the dormant Commerce Clause by (1) regulating conduct that occurs wholly outside Kansas, (2) unduly burdening interstate commerce relative to the benefit it confers, and (3) imposing Kansas requirements when Internet commerce demands nationally uniform regulation. We disagree. The Kansas statute, as interpreted by the state officials charged with its enforcement, does not regulate extraterritorial conduct; this court's precedent informs us that the statute's burden on interstate commerce does not exceed the benefit that it confers; and Quik Payday's national-uniformity argument, which is merely a species of a burden-to-benefit argument, is not persuasive in the context of the specific regulation of commercial activity at issue in this case. We have jurisdiction under 28 U.S.C. § 1291 and affirm the district court.

I. BACKGROUND

From 1999 through early 2006, appellant Quik Payday was in the business of making modest, short-term personal loans, also called payday loans. It maintained an Internet website for its loan business. The prospective borrower typically found this website through an Internet search for payday loans or was steered there by third-party "lead generators," a term used for the intermediaries that solicit

consumers to take out these loans. In some instances Quik Payday sent solicitations by e-mail directly to previous borrowers.

Once on Quik Payday's website, the prospective borrower completed an online application form, giving Quik Payday his or her home address, birthdate, employment information, state driver's license number, bank-account number, social security number, and references. If Quik Payday approved the application, it electronically sent the borrower a loan contract, which the borrower signed electronically and sent back to Quik Payday. (In a small number of cases these last few steps took place through facsimile, with approved borrowers physically signing the contracts before faxing them back to Quik Payday.) Quik Payday then transferred the amount of the loan to the borrower's bank account.

Quik Payday made loans of $100 to $500, in hundred-dollar increments. The loans carried $20 finance charges for each $100 borrowed. The borrower either paid back the loans by the maturity date — typically, the borrower's next payday — or extended them, incurring an additional finance charge of $20 for every $100 borrowed.

Quik Payday was headquartered in Logan, Utah. It was licensed by Utah's Department of Financial Institutions to make payday loans in Utah. It had no offices, employees, or other physical presence in Kansas.

Between May 2001 and January 2005, Quik Payday made 3,079 payday loans to 972 borrowers who provided Kansas addresses in their applications. Quik Payday loaned these borrowers approximately

$967,550.00 in principal and charged some $485,165.00 in fees; it collected $1,325,282.20 in principal and fees. When a Kansas borrower defaulted, Quik Payday engaged in informal collection activities in Kansas but never filed suit.

Kansas regulates consumer lending, including payday lending, under its version of the Uniform Consumer Credit Code. *See* Kan. Stat. Ann. § 16a-1-101 through 16a-9-102 (KUCCC). The KUCCC defines payday loans, or "supervised loans," as those on which the annual percentage interest rate exceeds 12%. *Id.* § 16a-1-301(46). Under the KUCCC a payday lender (other than a supervised financial organization — in essence, a bank with a federal or state charter, *see id.* § 16a-1-301(44)) must obtain a license from the head of the consumer-and-mortgage-lending division of the OSBC before it can make supervised loans in Kansas. *See id.* §§ 16a-1-301(2), 16a-2-302. Obtaining a license requires paying an application fee of $425 (and a further $325 to renew each year), posting a surety bond costing approximately $500 per year, and submitting to a criminal background and credit check, for which there is no fee. Supervised lenders may not charge more than 36% per annum on unpaid loan balances of $860 or less, and may not charge more than 21% per annum on unpaid balances of more than $860. *See id.* § 16a-2-401(2). Supervised lenders are required to schedule installment payments in substantially equal amounts and at substantially regular intervals on loans of less than $1,000 and on which the finance charge exceeds 12%. *Id.* § 16a-2-308. When such loans are for $300 or less, they must be payable within 25 months, while such loans of

more than $300 must be payable within 37 months. *Id.* § 16a-2-308(a)-(b). Quik Payday was never licensed to make supervised loans by the OSBC.

In 1999 Kansas amended the provision of the KUCCC that governs the statute's territorial application. *See id.* § 16a-1-201. Before that year a consumer-credit transaction was deemed to have been "made in th[e] state," and to come under the KUCCC, if either (a) the creditor received in Kansas a signed writing evidencing the consumer's obligation or offer, or (b) "the creditor induces the consumer who is a resident of this state to enter into the transaction by face-to-face solicitation in this state." 1993 Kan. Sess. Laws ch. 200 § 3. The 1999 legislation amended paragraph (1)(b) to say that the transaction is deemed to have been made in Kansas if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state *by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means.*" Kan. Stat. Ann. § 16a-1-201(1)(b) (emphasis added). No party or amicus questions that the catch-all "other electronic means" includes the Internet.

Under the KUCCC a consumer's residence is the address given by the consumer as his or her address "in any writing signed by the consumer in connection with a credit transaction." *Id.* § 16a-1-201(6). The statute does not define "solicitation." Defendants conceded in district court, however, that merely maintaining a website accessible in Kansas that advertises payday loans is not solicitation in Kansas under § 16a-1-201(1)(b). *See Quik Payday, Inc. v. Stork*, 509 F. Supp. 2d 974, 982 n.7 (D. Kan. 2007).

In June 2005 the OSBC received a complaint from a Kansas consumer about a loan transaction with Quik Payday. The agency responded by ordering Quik Payday, which was not on its list of licensed supervised lenders, to produce documents regarding its loans to Kansas residents. Quik Payday submitted the requested documents, which revealed the above-mentioned 3,079 payday loans to 972 Kansas residents. On March 13, 2006, the OSBC issued a summary order that required Quik Payday to stop all payday lending to Kansas residents, halt any collections on outstanding loans, pay a civil penalty of $5 million, and return to the borrowers the interest, service fees, and profits from the 3,079 loans. The order also barred Quik Payday from applying in the future to become a licensed payday lender in Kansas. Quik Payday timely requested an administrative hearing to challenge the order.

On May 19, 2006, shortly before the scheduled date of the administrative hearing, Quik Payday filed this lawsuit under 42 U.S.C. § 1983 against Defendants in the United States District Court for the District of Kansas. (Quik Payday requested and was granted a stay of the administrative hearing; as a result, no final order has been entered in that proceeding.) Quik Payday's complaint in district court sought a declaratory judgment that Kansas could not regulate Quik Payday's loans and an injunction barring such regulation. It claimed that both Kan. Stat. Ann. § 16a-1-201(1)(b) itself and Kansas's application of its consumer-credit laws to Quik Payday under this provision of the statute are unconstitutional under the Commerce Clause and Due Process Clause.

Quik Payday moved for summary judgment, offering three arguments under the dormant Commerce Clause: (1) the statute is an impermissible extraterritorial regulation; (2) the statute impermissibly burdens interstate commerce under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); and (3) the statute subjects Internet lending to inconsistent state regulations. On the same day, Defendants moved for summary judgment on Quik Payday's constitutional claims, including its contentions under the Due Process Clause that Kansas lacked the power to regulate it and that Kan. Stat. Ann. § 16a-1-201 is unconstitutionally vague and overbroad. (Quik Payday did not seek summary judgment on these due-process claims). The parties stipulated to the facts to be considered by the district court in deciding their motions.

The district court denied Quik Payday's motion for summary judgment and granted Defendants' cross-motion. It rejected each of Quik Payday's three Commerce Clause challenges to the Kansas statute and its application to Quik Payday. It rejected the contention that Kansas was seeking to regulate conduct entirely outside its borders because the Kansas statute is triggered only if there is both solicitation in Kansas and a loan to one of its residents. *Quik Payday*, 509 F. Supp. 2d at 981. With regard to *Pike* balancing, the court cited our decision in *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978), for the proposition that "a state's regulation of the cost and terms on which its residents borrow money from an out-of-state creditor is not outweighed by the burdens on interstate commerce." *Quik Payday*, 509 F. Supp. 2d at 979. And as to national uniformity, the court determined that Quik

Payday had not shown that "internet payday lending specifically represents the type of commerce that should only be subject to nationally-uniform standards," *id.* at 983; its regulated conduct was aimed specifically at Kansas and did not necessarily implicate other states or their regulations. The court also entered summary judgment for Defendants on Quik Payday's due-process claims. *Id.* at 984–85.

Quik Payday appeals the district court's grant of summary judgment to the Defendants and the denial of summary judgment to itself.[1] It does not challenge the district court's due-process rulings but only those regarding the Commerce Clause.

II. DISCUSSION

We review a district court's decision to grant summary judgment de novo, viewing all facts in the light most favorable to the party opposing summary judgment. *See Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004). We will affirm a grant of summary judgment if there is no genuine issue of material fact and the prevailing party is entitled to judgment under the law. *See id.* at 426; Fed. R. Civ. P. 56(c). Likewise, we conduct de novo review of legal issues, including challenges to the constitutionality of statutes. *See Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1138 (10th Cir. 2003).

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[1] Although the denial of a summary-judgment motion is ordinarily not an appealable order, it can be reviewed when "it is coupled with a grant of summary judgment to the opposing party." *Yuffee Cos. v. Great Am. Ins. Co.*, 499 F.3d 1182, 1184 (10th Cir. 2007) (internal quotation marks omitted).

A. The Dormant Commerce Clause

The Supreme Court "long has recognized that th[e] affirmative grant of authority to Congress [to regulate interstate commerce] also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989); *see Dennis v. Higgins*, 498 U.S. 439, 447 (1991) ("[T]he Commerce Clause does more than confer power on the Federal Government; it is also a substantive restriction on permissible state regulation of interstate commerce." (internal quotation marks omitted)). State statutes may violate the dormant limitation in three ways:

> First, a statute that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid *per se* and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. Second, if the statute does not discriminate against interstate commerce, it will nevertheless be invalidated under the *Pike* [397 U.S. at 142] balancing test if it imposes a burden on interstate commerce incommensurate with the local benefits secured. Third, a statute will be invalid *per se* if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.

KT & G Corp. v. Att'y Gen. of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008) (internal quotation marks omitted).

Although Quik Payday treats the need for national uniformity as an additional ground for determining that a state law violates the Commerce Clause, concerns about national uniformity are simply part of the *Pike* burden/benefit balancing analysis. When assessing the burden of a state law on interstate commerce, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. For example, in *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), the Supreme Court declared that states may not "regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Id.* at 767. But its holding that a state law could not limit train lengths was supported by what amounts to *Pike* balancing — namely, (1) a thorough analysis of the problems that would be created for interstate railroad transportation if each state could regulate train lengths and (2) an assessment that such state regulation would confer little, if any, local benefit. *Id.* at 771–79; *cf. ACLU v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999) ("[T]he Supreme Court has long recognized that certain types of commerce are uniquely suited to national, as opposed to state, regulation.").

Quik Payday does not argue that the Kansas statute discriminates against interstate commerce in favor of the local variety. Rather, it challenges the Kansas statute only under the extraterritorial-impact and *Pike* balancing tests. To the extent that it

also argues what it terms the "national unity" test, we will treat that issue as part of the balancing process.

B. Extraterritoriality

Quik Payday argues that the Kansas statute regulates interstate commerce that happens entirely outside Kansas. It contends that the Kansas statute reaches cases in which a Kansas resident is "solicited" while using a work computer in Missouri and accepts the loan through the same computer. In support, it points to census data on the number of Kansas residents who work in metropolitan Kansas City, Missouri, and thus likely use computers that lie in Missouri. Additionally, it asserts that "lenders, having no ability to determine the physical location of the consumer at the time of the solicitation, are forced as a practical matter to abide by the K[U]CCC for all transactions with Kansas residents or refuse to lend to such residents altogether." Aplt. Br. at 43.

Defendants, however, have stipulated that such a transaction would not be governed by the Kansas statute. In district court they conceded that a website advertisement does not trigger application of Kan. Stat. Ann. § 16a-1-201(1)(b), even though the website is accessible in Kansas. *See Quik Payday*, 509 F. Supp. 2d at 982 n.7. Their brief in this court further clarified that the borrower's physical location at the time of the solicitation is controlling: it states that "[t]he [KUCCC] regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers *while they are in Kansas*." Aplee. Br. at 24 (emphasis added). And referring to Quik Payday's hypothetical "about a Kansas consumer leaving Kansas to acquire a

payday loan," *id.* at 25, it declared that "the OSBC would not try to apply the [KUCCC] to loans that occur under th[ose] circumstances," *id.* at 26. We adopt this reasonable interpretation of the statute by those charged with its enforcement. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.").

Quik Payday argues, however, that in practice the KUCCC will set the rules by which a payday lender deals with a Kansas resident, even if the transaction is conducted wholly outside Kansas. According to Quik Payday, this result follows from its inability to tell where the resident is located during Internet communications between Quik Payday and the resident. For example, it says, if a Kansas resident communicates with Quik Payday via his office computer in Missouri, Quik Payday will have to assume that the customer is actually in Kansas during the communications and it therefore will have to comply with the KUCCC. In our view, however, Quik Payday has failed to show that this possible extraterritorial effect of the statute is more than speculation. It has provided no evidence of any loan transaction with a Kansas resident that was effected totally outside Kansas. Even if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas — notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas. Although the Kansas statute would not apply to such a loan transaction (because the solicitation was not in Kansas), the transaction would not be wholly extraterritorial, and thus not problematic under the

dormant Commerce Clause. Moreover, Quik Payday has not explained how it would be burdensome to it simply to inquire of the customer in which state he is located while communicating with Quik Payday. In this circumstance, we will not hold that the KUCCC has a prohibited effect on extraterritorial commerce.

We note, however, that despite the failure of its constitutional challenge to the statute, Quik Payday may still be entitled to some relief. It is unclear whether any of the 3,079 transactions between Quik Payday and Kansas residents involved solicitations of Kansas residents while they were in Missouri or elsewhere outside Kansas. Such a transaction would not have violated Kansas law. That issue, however, is one for the state administrative proceeding that was stayed pending this litigation.

C. *Pike* Balancing

A state law that does not discriminate against interstate commerce may still be invalidated under the dormant Commerce Clause if it puts a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Although evidence regarding a particular company may be suggestive, the benefit-to-burden calculation is based on the overall benefits and burdens that the statutory provision may create, not on the benefits and burdens with respect to a particular company or transaction. "[T]he [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127–28 (1978); *see Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2002).

We applied *Pike* balancing in *Aldens*, which concerned Oklahoma's regulation of the interest rates charged to Oklahoma residents on interstate credit sales by an Illinois-based catalog retailer. The retailer had no physical presence in Oklahoma; all its advertising in the state was conducted by direct mail. 571 F. 2d at 1161. Its credit agreements with customers, which it also sent only by mail, recited that they were Illinois contracts and that all orders were deemed received in Illinois. *Id.* The retailer challenged the application of Oklahoma's statute setting maximum interest rates for credit transactions and prohibiting the collection of balances when the rates charged exceeded this cap. *Id.* at 1160. The parties stipulated that if Oklahoma law applied to the transactions with Oklahoma residents, Aldens' "reduction in finance charges, and the special processing costs directed to Oklahoma separately would amount to some $160,500.00 per year." *Id.* at 1161. Aldens' annual business in the state was $2,250,000, of which 81% was on credit. *See id.* We upheld Oklahoma's regulation against the retailer's Dormant Commerce Clause challenge, reasoning as follows:

> The states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits.
>
> Thus is this burden an unreasonable one in interstate commerce? [W]e reach the same conclusion [as other circuit courts]. There is a burden on Aldens to sort out the Oklahoma credit transactions, and accord them somewhat different treatment. There are apparently regular mailings to some 34,000 Oklahoma residents; these are followed by additional flyers

> and, if required, credit applications and charge account agreements. The dollar figure of total sales in Oklahoma is in the record as is an estimated cost of special treatment for Oklahoma residents. We agree with the trial court that on balance, a conformance with the Oklahoma cost of credit rules would not constitute an undue burden on interstate commerce. In the era of computers, the record shows that a sorting of this nature, with separate Oklahoma contracts, would not be such an unreasonable burden as compared to the local interest in the subject.

Id. at 1162 (citations omitted).

Aldens governs the analysis under the *Pike* test in this case. To begin with, we note that our review of the KUCCC is limited. Although Quik Payday might be burdened by statutory provisions regarding interest rates, repayment schedules, and loan renewals, we need not concern ourselves with provisions that have never been applied to Quik Payday (and which, because Quik Payday no longer operates as a payday lender, never will be). Perhaps some of those unapplied provisions are unconstitutional and must be stricken. But striking them would not entitle Quik Payday to relief if the provisions that *were* applied withstand a Commerce Clause challenge. Here, the sanction imposed on Quik Payday was based solely on its failure to obtain a license as a lender of supervised loans. Thus, we address only the burdens and benefits of the license requirement. *Cf. Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38 (1999) ("The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge

that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." (internal quotation marks omitted)).

The stipulated facts show that the burden of obtaining a license is limited to a $425 fee, a surety bond whose annual cost would be roughly $500, and a criminal-background check, for which there is no fee. Quik Payday presented no evidence of other expenses that it would incur. The burden on Quik Payday of obtaining a license would not be materially greater than the burden on Aldens. And on the other side of the ledger, Defendants point to significant benefits from the licensing requirement: the criminal-background check protects Kansas consumers from providing felons their financial data and access to their bank accounts; and the surety-bond requirement ensures that Kansas residents will have a meaningful remedy if they are harmed by a lender. We follow our decision in *Aldens* in holding that the burden of acquiring a license does not outweigh the benefit from that requirement.

Quik Payday tries to distinguish *Aldens* by suggesting that regulating Internet lending cannot, as a practical matter, protect Kansas residents, because such lenders can go offshore to avoid the reach of the state's law. In support, Quik Payday relies on our opinion in *Johnson*. That case involved constitutional challenges to a New Mexico statute that criminalized "dissemination of material that is harmful to a minor by computer." 194 F.3d at 1152. The challenged statute defined the offense as

> the use of a computer communications system that allows the input, output, examination or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct.

N.M. Stat. § 30-37-3.2(A) (1998). Our *Johnson* opinion affirmed the district court's grant of a preliminary injunction against enforcement of the statute, agreeing with the district court that the plaintiffs — groups whose Internet speech concerned women's health, gay and lesbian issues, and censorship and civil liberties, 194 F.3d at 1153 — were likely to prevail on the merits of their claim that the statute violated the dormant Commerce Clause. With regard to the benefit the statute might confer relative to its burden on interstate commerce, we observed that

> [t]he statute will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from Albuquerque, *and residents of Amsterdam have little incentive to comply with the statute.*

Id. at 1162 (emphasis added; brackets and internal quotation marks omitted). This conclusion was

reinforced by the state's proffered construction of the statute as governing only one-to-one e-mail communications between New Mexicans. This construction, we observed, "renders it so narrow in scope that the actual benefit conferred is extremely small." *Id.*

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Our case is readily distinguishable from *Johnson* in this respect. An offshore lender may well have incentives to comply with Kansas law. *Johnson* did not involve credit transactions. One who sent pornography to New Mexico from Amsterdam needed nothing in the future from the New Mexico resident. Payday lending, however, would not be very profitable if the borrowers refused to repay, or were prevented from repaying, their loans. Regulators can educate borrowers regarding their rights not to repay loans, and they may have authority to control lenders by seizing assets (such as a bank account) from which a lender expects to be repaid. We are not persuaded that Kansas would be powerless to protect its residents from offshore payday lenders who refused to comply with applicable Kansas laws.

Quik Payday also relies on national-uniformity arguments to support its Commerce Clause challenge. It contends that the nature of the Internet requires any regulation of Internet operations to be national in scope, not state-by-state. It finds support in the following quotation from *County of Mobile v. Kimball*, 102 U.S. 691 (1880):

> Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase,

> sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible.

Id. at 702. Quik Payday also quotes our comment in *Johnson* that "[t]he Internet, like rail and highway traffic, requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations." *Johnson*, 194 F.3d at 1162 (ellipses and internal quotation marks omitted).

But Quik Payday reads too much into these statements. The courts have not held that certain modes of interstate commerce always require uniform regulation. They have examined particular types of regulation and made individual determinations. For example, the Supreme Court has not held that all regulation of interstate railroads must be national in scope. In *Southern Pacific* the Court held that the length of interstate trains could not be regulated state by state, *see* 325 U.S. at 781–82, but it did not retreat from its prior decisions allowing individual states to impose some safety measures, such as limitations on the size and composition of crews on interstate trains, *see id.* at 779, 782.

Similarly, our language in *Johnson* must be read in the context of that case. The New Mexico statute at issue prohibited the use of the Internet "to knowingly and intentionally initiate or engage in [sexually explicit] communication with a person under eighteen years of age." *Johnson*, 194 F.3d at

1152 (internal quotation marks omitted). We rejected the state's attempt to construe this statute narrowly to include only Internet communications deliberately sent to a specific individual whom the sender knew to be a minor, *see id.* at 1158–59, and said that the prohibition extended to group communication, *see id.* at 1160. Our concern was that the statute would govern websites, bulletin-board services, and chat rooms, which can be accessed by virtually anyone, anywhere, without control by the one posting the information. *See id.* at 1157. If such a posting were subject to New Mexico law, it would be equally subject to the laws of every jurisdiction in which the Internet operated. *See id.* at 1159 ("[V]irtually *all* communication on the Internet would meet the statutory definition of 'knowingly' and potentially be subject to liability under [the statute].") Such a regulatory regime could obviously cripple that medium of communication.

Regulation of one-to-one commercial exchanges via the Internet, however, is quite a different matter. The potential for multiple jurisdictions to regulate the same transaction is much more limited. We reject the argument that the dormant Commerce Clause prohibits such regulation just because the parties use the Internet to communicate. *Cf. Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (in addressing whether the Due Process Clause prohibited a state's assertion of jurisdiction over an Internet transaction, the court wrote: "Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction [by the foreign jurisdiction over that entity] is proper. Different results should not be reached simply because business is conducted over

the Internet." (citation omitted)). Surely, for example, a state could prohibit the use of e-mail to convey an extortionate threat, just as it could prohibit such a threat by telephone. The possible burden on commerce arising from inconsistency among jurisdictions with an interest in a one-to-one commercial transaction conducted over the Internet must be assessed with respect to the specific type of regulation at issue.

Thus, we turn to Quik Payday's argument based on the specifics of the KUCCC. It contends that subjecting it to regulation by multiple states will in fact create inconsistency that would unduly burden interstate commerce. Quik Payday's briefs present a compilation of payday-loan laws in various states that, in its view, reveal how unmanageable its business would be if Kansas and other states could each enforce its own rules. Our review of those laws raises doubts about the merits of Quik Payday's argument. But we need not resolve the matter. Quik Payday is not being penalized by Kansas for the way it renews loans, or even for the interest rate it charges. Its misconduct was a simple failure to get a Kansas license. And requiring a license in each state does not impose an undue burden. The Supreme Court rejected an analogous argument in *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 545 U.S. 429 (2005). In that case, interstate trucking firms challenged Michigan's flat fee on trucks engaged in intrastate hauling (i.e., point-to-point deliveries within Michigan) under the dormant Commerce Clause. *See id.* at 431–32. The challengers' purely local activity apparently consisted of "topping off" interstate loads with loads for local delivery, thereby maximizing the profitable use of cargo space. *See id.* at 435. They argued that

because interstate trucks engaged in less intrastate trade as a share of their business than did purely local haulers, the flat fee discriminated against the former in favor of the latter. *See id.* at 431–32. The Supreme Court rejected the challenge on several grounds, among them that every state could legitimately assess such a fee without putting interstate commerce at a disadvantage:

> We must concede that here, as [the challengers] argue, if all States did the same, an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars, were it to "top off" its business by carrying local loads in many (or even all) other States. *But it would have to do so only because it engages in local business in all those States.*

Id. at 438 (emphasis added). If some future Internet payday lender were to point to potential inconsistency among the states in some other component of the KUCCC — say the handling of renewals — then a court could address whether the Commerce Clause bars this type of regulation. For this case, however, we need not undertake that task.

III. CONCLUSION

We AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

QUIK PAYDAY, INC., Plaintiff, v. JUDI M. STORK, in her official capacity as Acting Bank Commissioner, and KEVIN C. GLENDENING, in his official capacity as Deputy Commissioner of the OFFICE OF THE STATE BANK COMMISSIONER, STATE OF KANSAS, Defendants.	)	Case No. 06-2203-JWL

MEMORANDUM AND ORDER

This case arises out of sanctions imposed on Quik Payday, Inc., a Utah company offering short-term, "payday" loans over the internet, by the Kansas Office of the State Bank Commissioner (OSBC), relating to loans made by plaintiff to Kansas consumers. In its present action against OSBC officials for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, plaintiff alleges that Kan. Stat. Ann. § 16a-1-201 — the provision of the Kansas Uniform Consumer Credit Code (UCCC) that authorized the OSBC's regulation of plaintiff with respect to those loans — and its application by the

OSBC to plaintiff violate the dormant Commerce Clause and the Due Process Clause of the United States Constitution.[1]

This matter is presently before the Court on the parties' cross-motions for summary judgment. For the reasons set forth below, the Court concludes that the statute and its application to plaintiff do not violate either the Commerce Clause or the Due Process Clause. Accordingly, the Court grants defendant's motion for summary judgment (Doc. # 38) and denies plaintiff's motion for summary judgment (Doc. # 36), and judgment is entered in favor of defendants on all claims.

I. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Burke v. Utah Transit Auth. & Local 382*, 462 F.3d 1253, 1258 (10th Cir. 2006).

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[1] In its complaint, plaintiff challenges the constitutionality of the OSBC's decision to regulate plaintiff under the Kansas UCCC, but it does challenge specifically any particular sanction imposed by the OSBC. Accordingly, the propriety of any particular sanction is not before the Court.

II. Facts[2]

From May 2001 to January 2005, plaintiff's sole business was to provide unsecured, short-term "payday" loans to consumers by way of the internet. Plaintiff was registered with Utah's regulatory authorities to provide such loans in accordance with Utah law. Plaintiff's offices were in Utah; plaintiff did not have any offices, employees, or other physical presence in Kansas. During this period, plaintiff made a total of 3,079 payday loans to 972 consumers who provided a Kansas address on their applications ("Kansas consumers"). Plaintiff loaned a total of $967,550.00 to the Kansas consumers, and collected a total of $485,165.00 in finance charges or fees on those loans.

Some of the Kansas consumers discovered plaintiff by way of an internet search. Others were solicited by a third-party "lead generator", who would then gather information and forward the applications to plaintiff in Utah. In addition, some consumers who had previously borrowed from plaintiff received e-mail solicitations directly from plaintiff. After plaintiff approved the loans, the consumers would then typically transmit the loan contract with their electronic signatures to plaintiff, who would then complete the execution of the contracts in Utah (although a few consumers executed the contract by facsimile). Plaintiff would then deposit the loan proceeds into the consumers' bank accounts, including accounts in Kansas banks. In the event of default, plaintiff's representatives or a third-party collection agency would direct e-mails, letters, and/or

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[2] The parties have stipulated to the facts to be considered by the Court in ruling on these motions.

telephone calls into Kansas to seek repayment. Plaintiff never brought legal action in Kansas relating to a loan to a Kansas consumer.

Plaintiff did not seek a license from the Kansas OSBC pursuant to the UCCC. To obtain such a license, a lender must complete a short application; pay an application fee of $425 (with annual renewal fee of $325); obtain a surety bond, which would cost approximately $500 per year; and submit to a background and credit check.

The OSBC began investigating plaintiff after receiving a single complaint from a Kansas consumer in June 2005. On March 13, 2006, the OSBC issued to plaintiff, pursuant to the UCCC, a Summary Order to Cease and Desist, Pay Civil Penalty (Fine), to Bar from Future Application for Licensure, and to Pay Restitution for Violations. The Summary Order alleged that plaintiff made supervised loans without first having obtained a license as required by the UCCC.[3]

Plaintiff timely sought a hearing with the OSBC. In addition, on May 19, 2006, plaintiff filed the instant action against defendants seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Plaintiff alleges that Kan. Stat. Ann. § 16a-1-201 of the UCCC is unconstitutional on its face and as applied to plaintiff by the OSBC,

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[3] The parties did not identify any other terms of the Summary Order in the stipulated facts upon which the cross-motions are to be decided, nor did they include the Summary Order among the documents listed in the stipulation as available for the Court's consideration.

in violation of the Commerce Clause and the Due Process Clause. The administrative proceedings were then stayed pending the outcome of this suit.[4]

III. Commerce Clause

Plaintiff's payday loans to Kansas consumers fall subject to the Kansas UCCC, including its licensure requirement and other lending regulations, by virtue of Kan. Stat. Ann. § 16a-1-201. That statute provides as follows:

> (1) Except as otherwise provided in this section, K.S.A. 16a-1-101 through 16a-9-102 [the Kansas UCCC], and amendments thereto, apply to consumer credit transactions made in this state. For purposes of such sections of this act, a consumer credit transaction is made in this state if:
>
> . . .
>
> (b) the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means.
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> . . .
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> (6) For the purposes of [the UCCC], the residence of a consumer is the address given by the consumer as the consumer's residence in any

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[4] On September 26, 2006, the Court denied defendants' motion to dismiss based on the doctrines of standing, ripeness, and exhaustion. *See* Memorandum and Order (Doc. # 16).

> writing signed by the consumer in connection with a credit transaction. . . .

Id. (1)(b), (6). Plaintiff asserts that this statute and its application by the OSBC to plaintiff violate the Commerce Clause of the United States Constitution.

"The dormant implication of the Commerce Clause prohibits state regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *ACLU v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999) (internal quotations omitted) (quoting *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)). Relying on the Tenth Circuit's opinion in *Johnson*, plaintiff asserts that section 16a-1-201 violates the Commerce Clause in three ways: (1) it constitutes an unreasonable and undue burden on interstate commerce under the *Pike* balancing test; (2) it regulates conduct occurring wholly outside of Kansas; and (3) it subjects internet payday lending to inconsistent state regulation. *See id.* at 1160-61. These three bases for invalidation under the Commerce Clause are addressed in turn.

A. Pike *Balancing Test*

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Supreme Court set forth the following balancing test for use in applying the dormant Commerce Clause:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a

> legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citations omitted) (quoted in *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992)). "The person challenging a statute that regulates evenhandedly bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest." *Dorrance*, 957 F.2d at 763 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

Plaintiff contends that the burden on interstate commerce created by Kansas's regulation of out-of-state internet payday lenders clearly exceeds the benefits afforded by such regulation. Plaintiff argues that it could not stay in business if it had to comply with regulations in every state in which its borrowers were located, and that internet payday loan business would be driven out of the country. Plaintiff further argues that the local benefits of such regulation are not great because consumers are actually harmed by limiting lenders' ability to do business in Kansas through regulation, thereby limiting access to credit, and because it is already subject to regulation in its home state of Utah.

The Court agrees with defendants that this issue is controlled by the Tenth Circuit's opinion in *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978). The plaintiff there, Aldens, was an Illinois mail-order house that solicited business in Oklahoma by mailing catalogues and flyers to Oklahoma residents.

Id. at 1160-61. Aldens had no physical presence in Oklahoma, and all orders and credit applications were accepted in Illinois. *Id.* at 1161. The finance and credit charges imposed by Aldens conformed with Illinois and federal law, but its interest rates exceeded those allowed by the Oklahoma Consumer Credit Code, which applied by its terms to mail-order solicitation, sales, and the extension of credit in Oklahoma. *Id.*

Aldens brought suit, alleging that the application of the Oklahoma Code to its mail-order business violated the Commerce Clause and Due Process Clause. *Id.* at 1160. The Tenth Circuit rejected those challenges, following and citing with approval the opinions of the Third Circuit and Seventh Circuit in cases involving Aldens's mail-order business with consumers in other states. *Id.* at 1161-62 (citing *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975) and *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977)).

The Tenth Circuit applied the Supreme Court's balancing test, and held that "a conformance with the Oklahoma cost of credit rules would not constitute an undue burden on interstate commerce." *Id.* at 1162. The court noted that there would be a burden on Aldens "to sort out the Oklahoma credit transactions, and accord them somewhat different treatment." *Id.* The court further noted that, according to the stipulated facts, it would cost Aldens approximately $160,500 per year in processing costs and reduced finance charges (on gross sales in Oklahoma of $2,250,000) to comply with the Oklahoma regulations. *Id.* at 1161-62. Nevertheless,

the court held that that burden did not outweigh Oklahoma's interest in "the cost of credit for goods sold to its residents." *Id.*

The Third Circuit, in the opinion cited with approval by the Tenth Circuit, elaborated somewhat in the application of the balancing test. *See Aldens, Inc. v. Packel*, 524 F.2d at 47-50. The Third Circuit identified the fundamental issue as "whether the national interest in the free movement of money, credit, goods and services outweighs the valid local interest in restricting maximum interest rates on consumer 'loans' and setting uniform contract terms for such transactions." *Id.* at 47-48. The court resolved that issue as follows:

> Before the emergence of a national currency and a national monetary policy, and especially before the emergence of national concern over consumer protection in interstate commerce, the issue would not have been seriously debated. But even in the period since these developments, no case that we have been referred to has even so much as hinted that usury laws and related contract laws are not appropriate matters for local regulation. This despite the facts that such laws do burden interstate commerce, and that the burden is increased by the lack of uniformity. Considering, however, the historical recognition that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws, any judgment that the present proliferation of regulations of consumer credit transactions has burdened commerce unduly must be made by Congress. Here the legislative judgment made in § 1610(b)

> of the Truth in Lending Act[5] once more becomes significant. Congress has deferred to the states on the matter of maximum interest rates in consumer credit transactions. Since it has done so we decline to hold that the burden imposed by Pennsylvania on Aldens' interstate commerce by virtue of [the applicable Pennsylvania statute] is so great that it outweighs the Commonwealth's interest in regulating the rates which its resident consumers may pay for the temporary use of money or the terms on which they may contract for such sale.

Id. at 48-49 (footnote omitted); *see also Aldens, Inc. v. Ryan*, 571 F.2d at 1162 (following the decisions of the Third and Seventh Circuits in applying the balancing test).

The Court concludes that plaintiff's internet payday loan business easily fits within the courts' analysis and rationale in the *Aldens* cases. The Tenth Circuit has concluded that a state's regulation of the cost and terms on which its residents borrow money from an out-of-state creditor is not outweighed by the burdens on interstate commerce, including the burden of a cost to a particular creditor of $160,500 per year. The only evidence contained in the parties' stipulated facts reveal that it would cost plaintiff less than $1,000 per year to comply with Kansas's licensure requirement. Although plaintiff complains that it would suffer administrative burdens as well to ensure compliance with Kansas law on its loans to Kansas consumers, there is no evidence of what

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[5] This section provides that the federal Truth in Lending Act does not affect state laws relating to permissible rates or elements for credit transactions. *See* 15 U.S.C. § 1610(b).

those costs might be. Plaintiff also argues that the burdens of complying with every state's consumer lending laws would be great and would effectively eliminate its ability to do business. Again, however, plaintiff has provided no evidence to support that allegation. Nor has plaintiff shown that it is in fact subject to regulation in other states. At any rate, the existence of any such additional burden does not distinguish the present case from the *Aldens* cases. Plaintiff has not established a burden nearly as onerous as the burdens permitted in *Aldens*. Accordingly, the Court follows the Tenth Circuit in rejecting this Commerce Clause challenge based on the *Pike* balancing test.

Plaintiff attempts to distinguish the Tenth Circuit's decision in *Aldens* by noting that the Oklahoma regulations did not require that Aldens be qualified to do business in Oklahoma, while plaintiff must become licensed under Kansas law. Thus, plaintiff argues that its burdens are greater. As noted above, however, the cost of obtaining and maintaining a license is less than $1,000 per year, and plaintiff has not explained how the license requirement imposes a significantly greater burden than would mere compliance with the other applicable regulations.

Plaintiff also argues that while the mail-order business had a lot of contacts with Oklahoma, plaintiff merely maintains a website and therefore has no contacts with the state of Kansas. This argument ignores the requirement of the Kansas UCCC that, for its loans to be subject to regulation, plaintiff must have solicited business in Kansas. The stipulated facts also show that plaintiff had contacts with Kansas consumers in its collection activities. Thus, the court cannot agree that plaintiff had

significantly fewer contacts with the regulating state than Aldens had. Moreover, the number or type of such contacts played no role in the *Aldens* courts' decisions; to the contrary, the Tenth Circuit specifically rejected any arguments based on the "presence" concept or the place of sale, delivery, contract, or performance. *Aldens, Inc. v. Ryan*, 571 F.2d at 1161.[6]

The Tenth Circuit's *Pike* analysis in *Johnson*, on which plaintiff relies, is easily distinguished. *Johnson* and the case whose reasoning it adopted, *American Libraries Ass'n v. Pataki*, involved state statutes that criminalized the dissemination of material harmful to minors over the internet. *See Johnson*, 194 F.3d 1149; *Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). Because that conduct was not specific to the particular states, regulation would have had a drastic chilling effect on lawful conduct, thereby imposing an extreme burden on interstate commerce. *See Johnson*, 194 F.3d at 1161-62; *Pataki*, 969 F. Supp. at 177-81. Those courts also noted that the local benefits of the regulation were not especially great. *See Johnson*, 194 F.3d at 1161-62; *Pataki*, 969 F. Supp. at 177-81. In this case, however, plaintiff's conduct is only subject to regulation in

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[6] Amicus Online Lenders Alliance (OLA) tries to distinguish *Aldens* by arguing that that case involved sales to discrete locations, while the internet can be accessed from anywhere, including out-of-state. Again, however, the regulation requires solicitation specifically in Kansas, which provides sufficient contacts with the state. Pinpointing a specific location within the state is not relevant to the analysis. In addition, once a consumer submitted an application to plaintiff, that consumer's very discrete address in Kansas became known to plaintiff, who then accepted the loan and subsequently directed collection activities specifically to that location.

Kansas if it solicits in Kansas and then makes a loan to a Kansas consumer. Regulation of that specific conduct would not have any significant chilling effect on plaintiff's ability to conduct business in other places — if plaintiff cannot or will not comply with Kansas law, it need only refrain from making loans to persons who have applied with a Kansas address. *Johnson* does not govern this case simply because the internet is involved in each case. The burden on interstate commerce in this case does not approach the extreme burden present in *Johnson*. Moreover, the Tenth Circuit has specifically noted the states' interest in regulating consumer credit and lending, again distinguishing the present case from *Johnson*.

Finally, plaintiff cites *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280 (8th Cir. 1993), in which the Eighth Circuit ruled that Missouri's regulation of an out-of-state lender's business conducted in Missouri violated the Commerce Clause under the *Pike* balancing test. *Id.* at 283-85. That case is easily distinguished from the present case on two counts. First, in *Pioneer* the state's stated purpose in protecting its citizens from lending abuses was illusory because the lender had made loans only to *non-residents* who were stationed in Missouri. *Id.* at 284. In the present case, plaintiff's borrowers have identified themselves as Kansas residents, and the Tenth Circuit recognized in *Aldens* that a state has an interest in protecting loans to its citizens. Second, the lender in *Pioneer* provided evidence that its cost to comply with the regulations, which required an in-state office, would exceed $210,000, and that it would therefore be unable to maintain any profitable business in Missouri. *Id.* at 282. Plaintiff has provided no such evidence in the present case, and therefore plaintiff has not met its burden of showing

that the burdens on interstate commerce clearly outweigh the local benefits here. This case aligns much more readily with *Aldens*, and the Court therefore reaches the same conclusion reached by the Tenth Circuit in that case.

B. Conduct Occurring Wholly Outside Kansas

For its second basis, plaintiff argues that its regulation under the Kansas UCCC violates the Commerce Clause because the OSBC is regulating conduct occurring wholly outside the state of Kansas. Plaintiff argues that it had no physical presence in Kansas; that the loans were accepted (and, under Kansas choice-of-law principles, the contracts were therefore made) in Utah; and that the business was conducted over the internet, which defies concepts of geography such as state lines. Plaintiff argues that the use of this electronic medium is key, and that by using the internet, it does not do business in Kansas or in any particular state, but rather it does business across the country generally. Plaintiff again relies on *Johnson*, in which the Tenth Circuit invalidated a state law under the Commerce Clause on this basis. *See Johnson*, 194 F.3d at 1161-62.

This argument is easily rejected for the reason that plaintiff's conduct did not occur wholly outside of Kansas. In *Johnson*, the state regulation would have reached the conduct of placing something on the internet in another state that was not directed towards anyone in or related to the regulating state; thus, the statute would reach conduct occurring wholly outside the regulating state. *See id.* In this case, the regulated conduct by plaintiff was not an act that applied to and affected persons in a number of states at the same time; rather, the regulated

conduct related specifically to the state of Kansas. Accordingly, it cannot be said that plaintiff's conduct occurred wholly outside of Kansas.

First, the regulation at issue requires a loan to a Kansas resident. The fact that the loan is "made", for choice of law purposes, in Utah is irrelevant. The Kansas UCCC provides explicitly that a consumer credit transaction is "made" in Kansas if it is with a Kansas resident and induced by solicitation in Kansas. Kan. Stat. Ann. § 16a-1-201(1)(b). Moreover, in *Aldens*, the Tenth Circuit noted that a state may regulate "the consequences of commercial transactions on its citizens which arise or are directed from outside its borders," while expressly rejecting any reliance on the "presence" concept or the place of sale, delivery, contract, or performance. *See Aldens, Inc. v. Ryan*, 571 F.2d at 1161. The Court also agrees with the following reasoning of the Third Circuit in rejecting a Commerce Clause claim under this test:

> [C]ontracts formed between citizens in different states implicate the regulatory interests of both states. Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract.

A.S. Goldmen & Co. v. New Jersey Bur. of Securities, 163 F.3d 780, 787 (3d Cir. 1999);*accord Cambridge Credit Counseling Corp. v. Foulston*, 303 F. Supp. 2d 1188, 1196 (D. Kan. 2003) (quoting *A.S. Goldmen* in rejecting same Commerce Clause argument); *see also People v. Fairfax Family Fund, Inc.*, 47 Cal. Rptr.

812, 815 (Cal. Dist. Ct. App. 1965) ("To argue that defendant is not doing business in California, but engaged only in interstate commerce is to completely ignore the facts of life and reality."). Thus, plaintiff's entering into loan contracts specifically with Kansas citizens does not represent conduct occurring wholly outside Kansas.

Plaintiff also directed collection activities into Kansas, and those activities are also regulated by the Kansas UCCC. For that reason as well, the regulated conduct does not occur wholly outside of Kansas.

Plaintiff points to the hypothetical situation in which a Kansas consumer accesses its website and completes the transaction with plaintiff while using a computer outside Kansas. Plaintiff has not provided any evidence, however, that that actually occurred with respect to any of its loans to Kansas consumers. Moreover, regulation of plaintiff's loans to Kansas consumers under section 16a-1-201 also requires specific conduct in Kansas — solicitation by plaintiff in Kansas resulting in the loan transactions.

Amicus OLA argues that a lender soliciting by e-mail cannot tell whether the recipient is in fact in Kansas. The Kansas UCCC does not regulate mere solicitation however; rather, it regulates loans induced by solicitation in Kansas. Once plaintiff received a loan application with a Kansas address, plaintiff had notice that a loan to that consumer was subject to regulation in Kansas unless the loan was not in fact induced by solicitation in that state. Unlike the regulation in *Johnson*, there is no chilling effect here — plaintiff was not prevented or deterred or discouraged from soliciting or doing business with residents of states other than Kansas.

Certainly, under the hypotheticals posited by plaintiff and amicus, one might question whether the resulting loan was actually induced by solicitation in Kansas; however, the issue of whether any particular loan satisfied the requirements of Kan. Stat. Ann. § 16a-1-201, thereby subjecting the loan to regulation under the Kansas UCCC, is not before the Court in this case.[7] The only issue is whether that statute, on its face or as applied, violates the Commerce Clause or Due Process Clause. The statute requires a loan with a Kansas resident induced by solicitation in Kansas. Therefore, either on its face or as applied to plaintiff, the statute does not regulate conduct occurring wholly outside Kansas, and this basis for invalidation under the Commerce Clause is rejected.

C. Inconsistent State Regulation

Finally, plaintiff argues that its regulation in Kansas violates the Commerce Clause because it subjects internet payday lending to inconsistent state regulation. *See Johnson*, 194 F.3d at 1161, 1162. Plaintiff notes that the states have differing requirements for payday loans, and it argues that such lending should be subject only to nationally uniform standards.

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[7] Defendants have agreed that "solicitation in Kansas" under the statute does not include merely maintaining a website that may be accessed from Kansas, and the Court agrees that such an interpretation comports with the reasonable understanding of that language. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (in considering a facial challenge to a state law, a federal court must consider any limiting construction proffered by a state enforcement agency).

Once again, plaintiff relies on *Johnson*, *Pataki*, and other internet pornography cases. In *Johnson*, the Tenth Circuit, in conclusory fashion, agreed with the *Pataki* court that the internet, "like rail or highway traffic, requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations." *Id.* at 1162 (quoting *Pataki*, 969 F. Supp. at 182). The *Pataki* court, in its extensive analysis, noted that "[t]he unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed." *Pataki*, 969 F. Supp. at 168. Accordingly, the court concluded that "the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent regulation that, taken to its most extreme, could paralyze development of the Internet altogether." *Id.* at 169. In likening the internet to rail or highway traffic (subjects of commerce found by the Supreme Court to require nationally uniform regulations under the Commerce Clause), the *Pataki* court noted that an internet user cannot foreclose access to its work from certain states and thus cannot effectively bypass any particular state. *Id.* at 181-83.

Based on these cases, plaintiff argues that the Tenth Circuit has recognized that the internet should be subject only to national regulation. Thus, plaintiff argues that any state regulation of the internet payday loan industry violates the Commerce Clause. The Court disagrees.

It is clear that the reasoning of the *Johnson* and *Pataki* courts extends only to regulation of the content of the internet, and does not necessarily invalidate any regulation of commerce conducted over the internet. Instead, plaintiff must show that internet payday lending specifically represents the type of commerce that should only be subject to nationally-uniform standards and not to inconsistent state regulations.

Plaintiff cannot meet this standard. Plaintiff's conduct in making loans to Kansas consumers is not akin to railroad travel or highway travel or merely placing things on the internet. In those other instances, the same conduct could be subject to different and inconsistent regulations at the same time. Plaintiff's regulated conduct consisted of making a loan with a Kansas resident after solicitation in Kansas. That conduct is directed specifically towards a particular state and does not necessarily implicate other states. Plaintiff is not being regulated "by states that [it] never intended to reach and possibly was unaware were being accessed," *Pataki*, 969 F. Supp. at 168, and therefore there is no similar need for nationally uniformity. Internet payday lenders can easily bypass particular states in making loans. The discrete nature of the regulated transactions make the internet payday loan industry similar to the insurance industry or any other industry in which a company must tailor its business to conform to the laws of its customer's state of residence.

In addition, in its *Aldens* case, the Third Circuit rejected this basis for a Commerce Clause violation as applied to the mail-order credit business, again by reference to the federal Truth in Lending Act

and its "express congressional recognition of the appropriateness of a state law role with respect to interest rates in the field of consumer credit." *See Aldens, Inc. v. Packel*, 524 F.2d at 46-47 (citing 15 U.S.C. § 1610(b). The court concluded:

> It might be argued that § 1610(b) may be construed as an express adoption of state law as the appropriate federal standard for measuring interest rates in consumer credit transactions. But even if § 1610(b) is not so construed, at a minimum it is a congressional recognition that the maximum level of interest rates in consumer credit transactions is not a subject requiring a uniform national rule. In face of this express congressional recognition that national uniformity is not required it would not, we suppose, be open to the Court to hold otherwise.

Id. (footnotes omitted).

The fact that particular consumer lending activity involves the internet does not change this analysis. The Court agrees with the following reasoning of the Fifth Circuit, which rejected a similar argument under *Pataki* that the need for nationwide uniformity outweighs a state's interest in regulating "e-commerce":

> When considering laws that directly regulate internet activities, this alleged need for uniformity may well prevail. However, application of this principle in circumstances like the instant case would lead to absurd results. It would allow corporations or individuals to circumvent otherwise constitutional state laws and regulations simply by connecting the transaction to the internet.

Ford Motor Co. v. Texas Dept. of Transp., 264 F.3d 493, 504-05 (5th Cir. 2001).

Plaintiff and other internet payday lenders are not in danger of having inconsistent regulations from several states apply to the same transactions. The fact that plaintiff's business involves use of the internet does not change that result. The Court concludes that Kan. Stat. Ann. § 16a-1-201 and its application to plaintiff do not violate the Commerce Clause under this test.

D. Summary

Plaintiff's regulation under the Kansas UCCC does not violate the Commerce Clause under any of the three tests applied by the Tenth Circuit in *Johnson*. Accordingly, defendants are awarded summary judgment on plaintiff's claims under the Commerce Clause, and plaintiff's motion for summary judgment is denied.

IV. Due Process Clause

Defendants also seek summary judgment on plaintiff's claims under the Due Process Clause.[8] In its complaint, plaintiff alleged that regulation of internet payday lenders violated the Due Process Clause because the OSBC lacked "jurisdiction" over such activities, because out-of-state lenders do not have a "substantial nexus" with Kansas, and because there are "insufficient contacts between the regulated subject matter and Kansas." Complaint ¶¶ 33-35, 40 (Doc. # 1).

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[8] Plaintiff has not moved for summary judgment on its due process claims.

In *Aldens*, the Tenth Circuit rejected such a claim, holding that "the state's interest in the cost of credit extended for goods sold to its residents is sufficient to overcome due process objections." *Aldens, Inc. v. Ryan*, 571 F.2d at 1161. In so doing, the Tenth Circuit rejected any reliance on physical presence in the state or the place of sale or contract or performance. *Id.* As noted above with respect to plaintiff's "extraterritoriality" argument, lenders regulated under Kan. Stat. Ann. § 16a-1-201 necessarily have contacts with the State of Kansas. *See supra* Part III.B. Accordingly, the Court grants summary judgment if favor of defendants on this due process claim.[9]

Defendants also move for summary judgment on plaintiff's claim that Kan. Stat. Ann. § 16a-1-201(1) is unconstitutionally vague with respect to the term "solicitation in this state". Plaintiff addresses this claim only in the final paragraph of its opposition brief. Plaintiff cites the statute's official comment, which notes that "[n]o guidance is given [in the statute] on when a solicitation is made in Kansas or what role any solicitation that is deemed to have been made in Kansas must have played in the consumer's decision to enter into the transaction." *Id.* cmt. (2000). Plaintiff then summarily asserts that

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[9] In support of this claim, plaintiff argues only that its regulation proved unfair and unreasonable in light of its limited contacts with Kansas, its regulation by Utah, the existence of only one complaint in Kansas, and the harshness of the OSBC's sanctions. As noted above, plaintiff's complaint does not allege any due process violation based on the particular sanctions imposed by the OSBC under the Kansas UCCC, and therefore the issue is not before the Court. *See supra* note 1. Under the Tenth Circuit's holding in *Aldens*, regulation of internet payday lenders under the Kansas UCCC comports with due process.

this case presents a "textbook violation" of the Due Process Clause's vagueness standard. Plaintiff has not, however, indicated the manner in which the phrase "solicitation in this state" is vague or ambiguous, or how the phrase might reasonably be interpreted in different ways. Nor has plaintiff addressed the cases cited in the comment for guidance concerning its scope. *See, e.g., Watkins v. Roach Cadillac, Inc.*, 7 Kan. App. 2d 8, 14-15, 637 P.2d 458, 463 (1981) (holding that consumer protection act provision requiring sales or solicitation in Kansas was not unconstitutionally vague).

At any rate, plaintiff cannot challenge the statute for vagueness because its conduct falls within the statute under any reasonable interpretation. *See Village of Hoffman Estates*, 455 U.S. at 494 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). According to the stipulated facts, plaintiff directed e-mail correspondence to some Kansas consumers who had borrowed from plaintiff previously, in order to solicit future loans; and it directed some Kansas consumers to its website after those consumers were referred by a lead generator. This conduct would constitute "solicitation" under any reasonable interpretation. Therefore, plaintiff cannot challenge the statute for

vagueness, and defendants are awarded summary judgment on this claim under the Due Process Clause.[10]

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's motion for summary judgment (Doc. # 38) is granted, and plaintiff's motion for summary judgment (Doc. # 36) is denied, and judgment is entered in favor of defendant on all claims.

IT IS SO ORDERED.

Dated this 7th day of September, 2007, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

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[10] Plaintiff did not address any other possible claims or bases for relief in opposition to defendant's motion for summary judgment, and any such other claims are therefore deemed abandoned.

STATE OF KANSAS

OFFICE OF THE STATE BANK COMMISSIONER

CONSUMER & MORTGAGE LENDING DIVISION

TOPEKA, KANSAS

In the Matter of: Quik Payday, Inc., dba: Quik Payday.com, Quik Payday.com Financial Solutions Online, www.quikpayday.com, and Quik Payday 87 E. 1400 N. Logan, Utah 84341 and David Dunkley, President/Owner, and all Owners, Partners, Directors, Officers and Members Respondent.	Action Number: 06-CM-708

SUMMARY ORDER TO CEASE and DESIST, PAY CIVIL PENALTY (FINE), TO BAR FROM FUTURE APPLICATION FOR LICENSURE, and TO PAY RESTITUTION FOR VIOLATIONS

(In Accordance with K.S.A. 2005 Supp. 16a-6-108, and K.S.A. 77-537)

Pursuant to K.S.A. 2005 Supp. 16a-6-108, and K.S.A. 77-537, Kevin C. Glendening, the Deputy Commissioner of the Consumer Mortgage and Lending Division (hereinafter "Administrator") hereby orders Quik Payday, Inc., dba: Quik Payday.com, Quik Payday.com Financial Solutions Online, www.quikpayday.com, and Quik Payday, and David Dunkley, President/Owner, and all other Owners, Directors, Partners, Officers and Members (hereinafter "Respondents"), to cease and desist engaging in the business of making, and/or undertaking direct collection of payments from or enforcement of rights against debtors arising from, supervised loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46) and bars the Respondents from future application for licensure as a supervised lender pursuant to the Uniform Consumer Credit Code, at K.S.A. 16a-1-101 et seq., and all amendments thereto, (hereinafter the "Code"). Respondents are also ordered to pay a civil penalty (fine) of $5,000,000.00. Respondents are also ordered to pay restitution totaling $444,943.02 to 972 Kansas consumers, in the form of refunding all profits and/or interest or service fees received from said Kansas consumers as the result of the Respondents engaging in the business of making, and/or undertaking direct collection of payments from at least 3,077 supervised loans with said Kansas consumers. Such action is taken for the following reasons:

1. Since May 11, 2001, the Respondents have engaged in the business of making, and/or undertaking direct collection of payments from, at least 3,077 supervised (payday) loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46), with at least 972 Kansas consumers, without first having obtained

a license from the Administrator. Respondents have engaged in such business from its business located at 87 E. 1400 N, Logan, Utah 84341 by electronic internet solicitation with at least 971 Kansas consumers, and by direct mail solicitation to at least one Kansas consumer, resulting in at least 3,077 violations of K.S.A. 16a-2-301.

2. Since May 11, 2001, Respondents have engaged in the business of making, and/or undertaking direct collection of payments from, at least 3,077 supervised (payday) loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46), with at least 972 Kansas consumers without filing or maintaining an adequate surety bond with the Administrator, resulting in at least 3,077 violations each of K.S.A. 2005 Supp. 16a-2-302 (2), and K.A.R. 75-6-31, as amended by Kansas Register Vol. 24, No. 51, p. 1849.

3. Since May 11, 2001, Respondents have engaged in the business of making, and/or undertaking direct collection of payments from, at least 3,077 supervised (payday) loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46), with at least 972 Kansas consumers and failed to pay the Administrator the annual supervised lender license fee as required, resulting in at least six violations of K.S.A. 2005 Supp. 16a-2-302(1)(b).

4. Since May 11, 2001, Respondents have failed to file notification with the Administrator within 30 days after commencing business in Kansas as required, resulting in at least five violations each of K.S.A. 2005 Supp. 16a-6-202 and K.A.R. 75-6-32.

5. Since May 11, 2001, Respondents have failed to pay the Administrator the annual fee as required, resulting in at least five violations of K.S.A. 2005 Supp. 16a-6-203.

6. The Respondents have not complied with an order of the Administrator issued July 8, 2005, as Action No.: 05-CM-542, to produce documents and information concerning the Respondent's payday loan activity with Kansas consumers, resulting in at least one violation of K.S.A. 2005 Supp. 16a-6-108 (1).

7. Since May 11, 2001, Respondents have engaged in the business of making, and/or undertaking direct collection of payments from, at least 3,077 supervised (payday) loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46), and failed to provide the borrower with the required "borrower notice" in at least 3,077 Kansas consumer's payday loans, resulting in at least 3,077 violations of K.S.A. 2005 Supp. 16a-2-404 (4).

8. Since May 11, 2001, Respondents have engaged in the business of making, and/or undertaking direct collection of payments from, at least 3,077 supervised (payday)

loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46), and have failed to give the Kansas "Notice to Consumer" on any written loan agreement, resulting in at least 3,077 violations of K.S.A. 2005 Supp. 16a-3-202.

9. Since May 11, 2001, Respondents have charged or attempted direct collection of payments from at least 972 Kansas consumers on at least 1,750 supervised loans for a supervised loan finance fee in excess of the maximum amount permitted under Kansas law, resulting in at least 1,750 violations of K.S.A. 2004 Supp. 16a-2-404 (1).

10. Since May 11, 2001, Respondents have charged or attempted direct collection of payments from at least 972 Kansas consumers on at least 1,327 supervised loans for a supervised loan finance fee in excess of the maximum amount permitted under Kansas law, resulting in at least 1,327 violations of K.S.A. 2005 Supp. 16a-2-401 (2).

11. Since May 11, 2001, Respondents have charged or attempted direct collection of payments from at least 972 Kansas consumers on at least 1,768 supervised loans for a supervised loan finance fee in excess of the maximum amount permitted under Kansas law by charging an "extension fee", resulting in at least 1,768 violations of K.S.A. 2005 Supp. 16a-2-404 (6).

12. Since May 11, 2001, Respondents have charged or attempted direct collection of payments from at least 113 Kansas consumers on at least 113 supervised loans for a supervised loan finance fee in excess of the maximum amount permitted under Kansas law by charging more than one insufficient fund check service charge on each loan, resulting in at least 113 violations of K.S.A. 2005 Supp. 16a-2-404 (7).

13. In aggregate, the violations of the Code, cited above in allegations 1. through 12., warrant the Administrator's belief that the Respondents would not operate a supervised loan business honestly and fairly within the purpose of the Code, justifying the Administrator's issuance of this cease and desist order, fine imposition, restitution order imposition, and bar of the Respondents from future application for licensure as a supervised lender pursuant to K.S.A. 2005 Supp. 16a-6-108.

IT IS THEREFORE ORDERED, pursuant to K.S.A. 2005 Supp. 16a-6-108, that

1. Respondents shall immediately cease and desist engaging in the business of making, and/or undertaking direct collection of payments from, supervised loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46), with Kansas consumers. All signage for payday loans/advances to Kansas consumers must be

removed and any advertisements, including electronic internet solicitation, must be withdrawn from circulation.

2. Respondents shall pay a civil penalty (fine) in the amount of $5,000,000.00 made payable to the Kansas Office of the State Bank Commissioner.

3. Respondents shall be barred from future application for licensure as a supervised lender pursuant to the Code.

4. Respondents shall pay restitution to 972 Kansas consumers in the form of refunding all profits and/or interest or service fees received as the result of engaging in the business of making, and/or undertaking direct collection of payments from at least 3,077 supervised loans, as defined by K.S.A. 2005 Supp. 16a-1-301 (46), with these 972 Kansas consumers, and shall pay interest to these 972 Kansas consumers on all said profits and/or interest or service fees at the rate of 8% per annum from May 11, 2001. Respondents shall execute these refunds per the amounts stated, the Kansas consumers listed, and at the addresses stated on the Respondents' loan list dated August 12, 2005, in Action No.: 05-CM-542.

BY THE ADMINISTRATOR IT IS SO ORDERED.

Date: March 13th, 2006.

/s/ Kevin C. Glendening
Kevin C. Glendening
Deputy Commissioner (Administrator)

NOTICE

Pursuant to K.S.A. 77-542, Respondents are hereby given notice of the right to request a hearing on this Order. Such request must be in writing and filed with the Administrator within 15 days of service of this notice. If a hearing is not requested, this Order shall become effective upon the expiration of the time for requesting a hearing. Once this Order becomes effective it shall remain in effect indefinitely or until such time as the Administrator modifies or terminates the Order. Upon this Order becoming effective and final the Respondents have 30 days to file an appeal petition for judicial review under K.S.A. 77-601 et seq., with the Clerk of the Third Judicial District Court of Kansas and serve a copy on the Administrator, at 700 S.W. Jackson, Suite 300, Topeka, Kansas 66603-3795.

CERTIFICATE OF SERVICE

I, Margie Smith, hereby certify that I personally caused a true and correct copy of this Order to Cease and Desist, Pay Civil Penalty (Fine), To Bar From Future Application For Licensure, and To Pay Restitution For Violations, to be placed in first class mail, postage prepaid, on this 13th day of March, 2006, addressed at the last known address to the following:

David Dunkley, President/Owner of Quik Payday, Inc., dba: Quik Payday.com, Quik Payday.com Financial Solutions Online, www.quikpayday.com, and Quik Payday 87 E. 1400 N.
Logan, Utah 84341
Respondents;

George R. Sutton, Esq.
Attorney at Law
Callister, Nebeker & McCullough
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, Utah 84133
Attorney for the Respondents; and

All other Owners, Directors, Partners, Officers and Members of Quik Payday, Inc., dba: Quik Payday.com, Quik Payday.com Financial Solutions Online, www.quikpayday.com, and Quik Payday
87 E. 1400 N.
Logan, Utah 84341
Respondents;

Robert J. Hoffman, Esq.
Attorney At Law
Bryan Cave LLP
1200 Main St., Suite 3500
Kansas City, Missouri 64105-2100
Local Kansas counsel for the Respondents.

/s/ Margie Smith
Margie Smith

KCG:DJV:djv

LEXSTAT KAN STAT ANN 16A-1-201

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*** THIS DOCUMENT IS CURRENT THROUGH THE 2007 SUPPLEMENT ***

*** ANNOTATIONS CURRENT THROUGH AUGUST 1, 2008 ***

CHAPTER 16A. CONSUMER CREDIT CODE

ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS

PART 2 SCOPE AND JURISDICTION

GO TO KANSAS STATUTES ARCHIVE DIRECTORY

***K.S.A. § 16a-1-201* (2007)**

16a-1-201. (UCCC) Territorial application.

(1) Except as otherwise provided in this section, *K.S.A. 16a-1-101* through *16a-9-102*, and amendments thereto, apply to consumer credit transactions made in this state. For purposes of such sections of this act, a consumer credit transaction is made in this state if:

(a) A signed writing evidencing the obligation or offer of the consumer is received by the creditor in this state; or

(b) the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means.

(2) With respect to consumer credit transactions entered into pursuant to open end credit (subsection (31) of *K.S.A. 16a-1-301*, and amendments thereto), this act applies if the consumer's communication or indication of intention to establish the arrangement is received by the creditor in this state. If no communication or indication of intention is given by the consumer before the first transaction, this act applies if the creditor's communication notifying the consumer of the privilege of using the arrangement is mailed or personally delivered in this state.

(3) The part on limitations on creditors' remedies (part 1) of the article on remedies and penalties (article 5) applies to actions or other proceedings brought in this state to enforce rights arising from consumer credit sales, consumer leases, or consumer loans, or extortionate extensions of credit, wherever made.

(4) A consumer credit transaction made in another state to a person who is a resident of this state at the time of the transaction is valid and enforceable in this state to the extent that it is valid and enforceable under the laws of the state applicable to the transaction, but the following provisions apply as though the transaction occurred in this state:

(a) A creditor may not collect charges through actions or other proceedings in excess of those permitted by the article on finance charges and related provisions (article 2); and

(b) a creditor may not enforce rights against the consumer with respect to the provisions of agreements which violate the provisions on

limitations on agreements and practices (part 3) and limitations on consumer's liability (part 4) of the article on regulation of agreements and practices (article 3).

(5) Except as provided in subsection (3), a consumer credit transaction made in another state to a person who was not a resident of this state when the sale, lease, loan, or modification was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

(6) For the purposes of *K.S.A. 16a-1-101* through *16a-9-102*, and amendments thereto, the residence of a consumer is the address given by the consumer as the consumer's residence in any writing signed by the consumer in connection with a credit transaction. Until the consumer notifies the creditor of a new or different address, the given address is presumed to be unchanged.

(7) Notwithstanding other provisions of this section:

(a) Except as provided in subsection (3), *K.S.A. 16a-1-101* through *16a-9-102*, and amendments thereto, do not apply if the consumer is not a resident of this state at the time of a credit transaction and the parties have agreed that the law of the consumer's residence applies; and

(b) *K.S.A. 16a-1-101* through *16a-9-102*, and amendments thereto, apply if the consumer is a resident of this state at the time of a credit transaction and the parties have agreed that the law of the consumer's residence applies.

(8) Except as provided in subsection (7) the following agreements by a buyer, lessee, or debtor are invalid with respect to consumer credit transaction to which *K.S.A. 16a-1-101* through *16a-9-102*, and amendments thereto, apply:

(a) That the law of another state shall apply;

(b) that the consumer consents to the jurisdiction of another state; and

(c) that fixes venue.

(9) The following provisions of this act specify the applicable law governing certain cases:

(a) Applicability (*K.S.A. 16a-6-102*, and amendments thereto) of the part on powers and functions of administrator (part 1) of the article on administration (article 6); and

(b) applicability (*K.S.A. 16a-6-201*, and amendments thereto) of the part on notification and fees (part 2) of the article on administration (article 6).

(10) With respect to a consumer credit sale or consumer loan to which *K.S.A. 16a-1-101* through *16a-9-102*, and amendments thereto, does not otherwise apply by reason of the foregoing provisions of this section, if, pursuant to a solicitation relating to a consumer credit sale or loan received in this state, a person who is a resident of this state sends a signed writing evidencing the obligation or offer of the person to a creditor in another state, and the person receives the goods or services purchased or the cash proceeds of the loan in this state:

(a) The creditor may not contract for or receive charges exceeding those permitted by this code, and such charges as do exceed those permitted are excess charges for purposes of subsections (3) and (4) of *K.S.A. 16a-5-201* and *16a-6-113*, and amendments thereto, and such sections shall apply as though the consumer credit sale or consumer loan were made in this state; and

(b) the part on powers and functions of administrator (part 1) of the article on administration (article 6) shall apply as though the consumer credit sale or consumer loan were made in this state.

HISTORY: L. 1973, ch. 85, § 9; L. 1977, ch. 70, § 1; L. 1981, ch. 93, § 4; L. 1993, ch. 200, § 3; L. 1999, ch. 107, § 7; July 1.

NOTES:

1. This section enables Kansas to apply the U3C for the protection of its own consumer residents in multi-state transactions.

2. Under the original version of subsections (1) and (2) of this section, the issue of whether a transaction was deemed to have been made in Kansas (thus triggering application of the entire U3C) was dependent on the place at which the executed contract was received by the creditor and whether any face-to-face solicitations occurred in Kansas. As a result, creditors had a measure of control over the applicability of the U3C to their transactions and could arrange their interstate operations in a manner that minimized the operational difficulties arising from the variations in the laws of different states. This flexibility on the part of creditors (at least with respect to the

applicability of the U3C's disclosure provisions) offered no threat to consumers because the CCPA assured consumers that disclosure requirements would be substantially similar in all states.

Subsection (1)(b) was amended, however, in the 1999 legislative session to remove the "face-to-face" qualifier from the solicitation test. This amendment was driven primarily by a concern over the growing use of the Internet as a means of soliciting Kansas consumers to enter into credit transactions with out-of-state creditors. However, this seemingly innocuous amendment sweeps well beyond the Internet and, if given an expansive interpretation, could have enormous potential consequences for out-of-state creditors.

Under amended subsection (1)(b), the applicability of the U3C to a multi-state transaction turns on whether there is "solicitation in this state." No guidance is given on when a solicitation is made in Kansas or what role any solicitation that is deemed to have been made in Kansas must have played in the consumer's decision to enter into the transaction. However, guidance may be found in cases construing similar phrases in other statutes. For instance, in *Norton v. Local Loan, 251 N.W.2d 520 (Iowa 1977),* the court held that a long distance phone call from the creditor's out-of-state agent to the consumer was "conduct in this state" within the meaning of that phrase in the Iowa U3C. Similarly, in *Watkins v. Roach Cadillac, Inc., 7 Kan. App. 2d 8, 637 P.2d 458 (1981),* the court held that out-of-state radio and newspaper advertisements which reached a Kansas consumer were "solicitations" sufficiently "within this state" to bring the transaction within the scope of the KCPA.

It seems quite unlikely that a Kansas resident will locate an out-of-state creditor, travel to the creditor's state and consummate a consumer credit transaction with that creditor unless the creditor has "solicited" the consumer by the use of targeted telephone, mail or other direct marketing or general radio, television, or other non-individualized advertisements received or seen by the consumer in Kansas. Thus, as a practical matter, nearly all consumer credit extended by out-of-state creditors to Kansas residents would be deemed to have been made in Kansas if an expansive interpretation is given to amended subsection (1)(b). Under such an interpretation, the entire U3C (including its licensing requirements, its disclosure requirements and its substantive limitations) would apply to those transactions. As a result, much of the remainder of this section would be rendered surplusage — there simply would be precious few transactions that slip past the broad net cast by such an interpretation of amended subsection (1)(b).

3. Under subsections (7) and (8), choice of law agreements have been invalidated except where the law chosen is that of the state of the consumer's residence. This eliminates the danger that creditors could induce consumers to agree that the applicable law would be that of a creditor's haven that had no effective credit protection.

4. Creditors falling within the supervised lender category (part 3 of article 2) need to be licensed only in the state where the loan is made. As noted in Kansas comment 2 to this section, however, under an expansive interpretation of amended subsection (1)(b) virtually all supervised loans extended to Kansas residents would be deemed to have been

made in Kansas and, as a result, out-of-state creditors extending those loans would need a Kansas supervised lender's license. Note, however, that (a) an out-of-state supervised financial organization does not need a supervised lender's license to make supervised loans in Kansas and (b) federally-insured financial institutions may "export" to Kansas the interest rates and related charges permitted by the law of their home states as a matter of federal law. See *Smiley v. Citibank (South Dakota), N.A., 116 S.Ct. 1730 (1996).*

RESEARCH AND PRACTICE AIDS:

Consumer Credit 1 et seq.

C.J.S. Interest and Usury; Consumer Credit § 274.

LAW REVIEW AND BAR JOURNAL REFERENCES:

"Summary Repossession, Replevin, and Foreclosure of Security Interests," Thomas V. Murray, *46 J.B.A.K. 93, 95 (1977).*

Warranty violations in tripartite finance lease agreements, Winton A. Winter, Jr., *25 K.L.R. 573, 582 (1977).*

"Insurer's Bad Faith: A New Tort for Kansas?" *Janet Amerine and Jan E. Montgomery, 19 W.L.J. 467, 485 (1980).*

"Creditor Beware: From Default Through Deficiency Judgment," Wanda M. Temm, 60 J.K.B.A. No. 8, 17, 18 (1991).

"To Be (Transformed) or Not to Be: The Transformation Versus Dual-Status Rules for Purchase-Money Security Interest Under Kansas' Former and Revised Article 9," Christopher Harry, *50 K.L.R. 1095 (2002).*

"History & Overview of the Uniform Consumer Credit Code," Ryan E. Hodge, J.K.T.L.A. Vol. XXVI, No. 3, 8 (2003).

ATTORNEY GENERAL'S OPINIONS:

Finance charge for consumer loans; supervised lenders. 79-286.

Scope and jurisdiction of UCCC; territorial application. 90-38.

CASE ANNOTATIONS

1. Cited in holding parties to business loans may agree to subject themselves to UCCC (16a-1-109). *Farmers State Bank v. Haflich, 10 K.A.2d 333, 336, 699 P.2d 533 (1985).*

2. Issue concerning whether KUCCC (16a-5-101 et seq.) applied to mortgage transaction between out of state financier and residents precluded summary judgment. *Pilcher v. Direct Equity Lending, 189 F.Supp.2d 1198, 1208 (2002).*

HISTORY: L. 1973, ch. 85, § 9; L. 1977, ch. 70, § 1; L. 1981, ch. 93, § 4; L. 1993, ch. 200, § 3; L. 1999, ch. 107, § 7; July 1.

LexisNexis (R) Notes:

CASE NOTES

1. Summary judgment in favor of debtors was inappropriate, in a suit brought by the debtors alleging violations of the Kansas Uniform Consumer Credit Code pursuant to *Kan. Stat. Ann. § 16a-2-301* et seq., where there were material questions of fact with respect to whether the creditor, an equity corporation, was entitled to the good faith defense accorded by *Kan. Stat. Ann. § 16a-5-201(7)* and with respect to whether the transactions were consumer transactions pursuant to *Kan. Stat. Ann. § 16a-1-201. Pilcher v. Direct Equity Lending, 189 F. Supp. 2d 1198, 2002 U.S. Dist. LEXIS 3987 (D. Kan. 2002).*

2. Uniform Consumer Credit Code, rather than the Uniform Commercial Code, applied to a lender's advance on commissions of real estate agents because the obligations were consumer credit transactions under *Kan. Stat. Ann. § 16a-1-201(1)* in that the loan satisfied all of the requirements of *Kan. Stat. Ann. § 16a-1-301(17)* where the lender was regularly engaged in the business of making loans, the agents were persons and not organizations, the loans were used for personal, family or household expenses, the discount charged by the lender was equivalent to a financing charge, and the loans were for less than $ 25,000. Thus, because the commissions constituted earnings, the lender could not enforce the loan against the real estate company that owed the commissions to their agents because an assignment of the commissions was prohibited by *Kan. Stat. Ann. § 16a-3-305(a). Decision Point, Inc. v. Reece & Nichols Realtors, Inc., 282 Kan. 381, 144 P.3d 706, 2006 Kan. LEXIS 665 (2006).*

3. Summary judgment in favor of debtors was inappropriate, in a suit brought by the debtors alleging violations of the Kansas Uniform Consumer Credit Code pursuant to *Kan. Stat. Ann. § 16a-2-301* et seq., where there were material questions of fact with respect to whether the creditor, an equity corporation, was entitled to the good faith defense accorded by *Kan. Stat. Ann. § 16a-5-201(7)* and with respect to whether the transactions were consumer transactions pursuant to *Kan. Stat. Ann. § 16a-1-201. Pilcher v. Direct Equity Lending, 189 F. Supp. 2d 1198, 2002 U.S. Dist. LEXIS 3987 (D. Kan. 2002).*

4. Where the buyer of a car defaulted in making payments due on the loan by which she had financed the purchase and the creditor mailed the buyer a notice of her default and of her right to cure the default pursuant to *Kan. Stat. Ann. § 16a-5-110* and *Kan. Stat. Ann. § 16a-1-201(6)*, by certified mail to the address listed in its records from information provided by the buyer, the creditor complied with the statutory notice requirements precedent to repossession. *Wade v. Ford Motor Credit Co., 8 Kan. App. 2d 737, 668 P.2d 183, 1983 Kan. App. LEXIS 187, 36 U.C.C. Rep. Serv. (CBC) 1433 (1983).*

5. Contrary to the assertions of an internet "payday" lender, *Kan. Stat. Ann. § 16a-1-201* did not violate the Commerce Clause pursuant to the *Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970),* balancing test as, though it argued that the regulation imposed by the statute on out-of-state internet payday lenders clearly exceeded the benefits afforded by such regulation, the issue was controlled by Tenth Circuit precedent, in which it was held that a state's regulation of the cost and terms on which its residents borrowed money from

an out-of-state creditor was not outweighed by the burdens on interstate commerce, including the burden of a cost to a particular creditor of $ 160,500 per year; the evidence revealed that it would cost the lender in issue less than $ 1,000 per year to comply with Kansas's licensure requirement. Moreover, the lender, despite its assertions, had contacts with Kansas residents in its loan solicitation and collection activities, and an argument based on the "presence" concept, or the place of sale, delivery, contract, or performance, was rejected. *Quik Payday, Inc. v. Stork, 509 F. Supp. 2d 974, 2007 U.S. Dist. LEXIS 66879 (D. Kan. 2007).*

6. Contrary to the assertions of an internet payday lender, *Kan. Stat. Ann. § 16a-1-201* did not violate the Commerce Clause by regulating conduct that occurred wholly outside of Kansas, as the regulation at issue required a loan to a Kansas resident, and the fact that the loan was actually "made" in Utah was irrelevant; moreover, the lender also directed collection activities in Kansas, and in addition, once the lender received a loan application with a Kansas address, it had notice that a loan to that consumer was subject to regulation in Kansas unless the loan was not in fact induced by solicitation therein. *Quik Payday, Inc. v. Stork, 509 F. Supp. 2d 974, 2007 U.S. Dist. LEXIS 66879 (D. Kan. 2007).*

7. Contrary to the assertions of an internet payday lender, *Kan. Stat. Ann. § 16a-1-201* did not violate the Commerce Clause by subjecting it to inconsistent state regulation; the lender could not meet the standard of showing that internet payday lending specifically represented the type of commerce that should only be subject to nationally uniform standards and not to inconsistent state regulation.

The lender's regulated conduct consisted of making a loan with a Kansas resident after solicitation in Kansas, and such conduct was directed specifically toward a particular state and did not necessarily implicate other states, and *15 U.S.C.S. § 1610*(b) was a congressional recognition that the maximum level of interest rates in consumer credit transactions was not a subject requiring a uniform national rule. *Quik Payday, Inc. v. Stork, 509 F. Supp. 2d 974, 2007 U.S. Dist. LEXIS 66879 (D. Kan. 2007).*

8. Contrary to the assertions of an internet payday lender, *Kan. Stat. Ann. § 16a-1-201* did not violate the Due Process Clause as the State's interest in the cost of credit extended for goods sold to its residents was sufficient to overcome due process obligations; any reliance on physical presence in the state or the place of sale or contract or performance was rejected. *Quik Payday, Inc. v. Stork, 509 F. Supp. 2d 974, 2007 U.S. Dist. LEXIS 66879 (D. Kan. 2007).*

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13. Uniform Consumer Credit Code, rather than the Uniform Commercial Code, applied to a lender's advance on commissions of real estate agents because the obligations were consumer credit transactions under *Kan. Stat. Ann. § 16a-1-201(1)* in that the loan satisfied all of the requirements of *Kan. Stat. Ann. § 16a-1-301(17)* where the lender was regularly engaged in the business of making loans, the agents were persons and not organizations, the loans were used for personal, family or household expenses, the discount charged by the lender was equivalent to a financing charge, and the loans were for less than $ 25,000. Thus, because the commissions constituted earnings, the lender could not enforce the loan against the real estate company that owed the commissions to their agents because an assignment of the commissions was prohibited by

Kan. Stat. Ann. § 16a-3-305(a). Decision Point, Inc. v. Reece & Nichols Realtors, Inc., 282 Kan. 381, 144 P.3d 706, 2006 Kan. LEXIS 665 (2006).

TABLE A

	LICENSING REQUIREMENTS						LENDING RESTRICTIONS						
State/Statute	**Fees**	**Surety Bond (SB), Liquid Asset (LA) or Net Worth (NW)**	**Books and Records Req.**	**In-state Agent Req.**	**Character. Ref. Req.**	**In-state Office Req.**	**Max. # Rollovers Allowed**	**Mandated Cooling-off Period between Transactions**	**Maximum Advance Amount**	**Min/Max Term**	**Check v. Cash**	**Payment Plan Option**	**Database Req.**
Alabama Code of Ala § 5-18A-1 et seq	$500 initial license fee per location + $100 investigation fee (single payment, not per location), $500 license fee annually for each location	No SB, LA $20k, net worth $25k	Books and records must be made available at applicant's expense	No	Yes - 3 letters for each owner	Not addressed in face of statute or other publications	1	Next business day after rollover is paid in full	$500	10/31 days	Cash	After rollover, if customer is unable to pay, may offer extended repayment option of 4 equal monthly installments of remaining balance	State mandated third-party database, where available
Alaska Alaska Stat. § 06 50 010 et seq.	$3k license fee for each location or Internet website (initial and renewal)	$25k SB ($50k if more than one location), $25k LA (per location)	Must keep books at place of business, state officials must be given unrestricted access to records for examination at cost of licensee	Requires appointment of Commissioner of the Department of Community and economic Development of the Dir of Div of Banking as agent	Yes	No	2	None	$500	14 days min/No max	Either	After default, but before collections, lender must attempt to contact customer to discuss delinquency and must offer a payment plan (§ 06.50.550)	None
Arizona A.R.S. § 6-1251 et seq	$1000 app fee + $500 per branch, $400 annual licensing fee + $200 per branch licensing fee (initial and renewal)	NW of $50k	Books must be made available in home and branch offices, licensee must pay costs of inspection	Not Mentioned	Yes - Personal history & fingerprint card	Not addressed in face of statute or other publications	3	None	$500	5 days min/No max	Either	None	None
Arkansas Ark. Stat. Ann. § 23-52-101 et seq	$500 application fee per location, $400 renewal fee per location	$50k (SB), $20k LA per location	Must keep books at place of business, silent as to who handles costs or where place of business must be	Yes - registered agent required	Yes	Not addressed in face of statute or other publications	0	None	$400	6/31 days	Either	None	None
California Cal Fin Code § 23000 et seq	$300 app fee per location	Yes - $25k SB and $25k net worth	Either keep books in the state, or pay the travel expenses	Not Mentioned	Yes - plus fingerprints	Not addressed in face of statute or other publications	0	None	$300 (max check amount)	No min/31 days max	Either	Permitted	None

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Colorado C R S. 5-3 1-101 et seq	$400 license fee (initial and renewal) + volume fee of $10 for each $100k in excess of $2m of unpaid balance of consumer loans	$25k financial responsibility per location (max $250k). SB, cash assignment, or letter of credit are acceptable	If books are kept outside state, must make available in state for examination or pay costs of travel	Yes - registered agent for service of process required	Yes - personal affidavits	Not addressed in face of statute or other publications	1	None	$500	No min/40 days max	Either	Not prohibited, except that cannot contract for minimum finance charge § 5-2-201(7)	None
Connecticut * Conn Gen Stat § 36a-555 et seq.	$800 or $400 license fee (depending on time of filing)	capital investment $25k per location if in city of 10,000 + people, $10k for all other locations	Books must be kept at place of business	Not Mentioned	Yes	Not addressed in face of statute or other publications	No limit	None	$15,000	No min/No max	Either	None	None
Delaware 5 Del. C. § 2201 et seq.	$250 investigation fee, $250 license fee (initial and renewal), supervisory assessment fee of $1000 if books are maintained out of state and $500 if books are maintained in state (initial and renewal)	SB $50k (or irrevocable letter of credit)	May be kept wherever convenient - must be made available	Yes - registered agent required	Yes - background and 3 business references	No	4	None	$500	No min/59 days max	Either	"Workout" agreement with borrower permitted after no more than four rollovers	None
District of Columbia D C. Code § 26-301 et seq.	$300 initial license fee(exception for limited station licensing fees). $200 renewal license fee	$5k bond per location, LA $25k per location	Made available, not specified where, at cost of licensee	Yes	Yes	Not addressed in face of statute or other publications	No limit	None	$1,000	No min/31 days max	Either	None	None
Florida Fla Stat § 560 401 et seq.	$250 app fee + $50 per branch, $1000 deferred presentment transactions declaration of intent filing fee (initial and renewal), $500 license renewal fee + $50 per branch (paid every two years)	No SB, No LA	Records must be kept in state	Yes - registered agent required	Yes - personal history and fingerprint card	Not clear	0	24 hours	$500	7/31 days	Either (but must give cash if requested)	Grace period with no add. charges after initial termination of 60 days required, however, consumers must make apmt with credit counseling	Dept of Banking operates industry-wide database

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Georgia † O C G A. § 16-17-1 et seq	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Hawaii HRS § 480F-4	$50 license fee per location (initial and renewal). $5,000 application fee	Not addressed in face of statute or other publications	Not addressed in face of statute or other publications	Not addressed in face of statute or other publications	Yes - background and character references	Not addressed in face of statute or other publications	0	None	$600 (max amount of customer's check)	No min/32 days max	Either	None	None
Idaho Idaho Code § 28-46-401 et seq	$350 application fee per branch, $150 renewal fee per branch	LA $30k + $5k for each branch (max $75k)	May be kept out of state - must pay travel expenses	Yes - registered agent for service of process required	Yes	Not addressed in face of statute or other publications	3	None	$1,000	No min/Max of 37 months if over $300, 25 months if $300 or less	Either	None	None
Illinois 815 ILCS 122/1-1 et seq.	$1000 license fee (initial and renewal), $2,500 initial investigation fee	SB $50k per location (max $500k), net equity of $30k	May be kept out of state - must pay travel expenses	Secretary of Financial and Professional Regulation must be appointed attorney-in-fact for service of process	Yes	No	0	7 days (if consumer indebted on 1 or more loans for 45 days or longer), 14 days (if customer is on a repayment plan and all other outstanding loans repaid)	Lesser of $1,000 or 25% of gross monthly income	13/45 days	Either	If customer still owes on one or more payday loan(s) after 35 days, entitled to enter into a repayment plan, restrictions of which set by statute	industry-wide database
Indiana IC § 24-4 5-6 and IC § 24-4 5-7 et seq	$2,000 + $1,000 license fee per add. branch (initial and renewal)	$50k bond per location w/max of $500k, net worth $100k, LA $50k	Records can be maintained out of state. licensee must provide for examination in IN or pay travel expenses to state where located	No	Yes - 3 references, credit report & criminal background check, interview of applicant	No	0	7 days (after initial plus 5 consecutive transactions), or convert to installment payments	$500 combined industry-wide; loan amnt + fees cannot exceed 15% of monthly gross income	14 day min/No max	Either	Permissive under IC 24-4 5-3 within 7 days after the due date of the 5th consecutive small loan	DFI-instituted mandatory third-party database

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wa wa Code § 33D 3 et seq. wa Code § 537 seq.	$100 app fee (according to statute, app website says $90); $250 renewal fee	$25k surety bond, $25k LA	Records must be kept at the offices licensee pays costs of examination	Foreign associations must agree that the superintendent will serve as process agent	Yes - background checks and fingerprint card	No	0	Next day if the total amount the customer repays plus the amount the customer wants is greater than $500	$500 (maximum amount of customer's check)	No min/31 days max	Either	None	None
ansas S A § 16a-1- 01 et seq.	$400 application fee for each branch + $25 annual notification fee per branch (initial and renewal)	$100k bond + $25k for each add. branch (max $300k), net worth $250k	Must list where all books and records are kept, not required to be in place where loans are made	No	Yes - background check and fingerprint card	No	0	None	$500	7/30 days	Either	None	None
entucky RS § 286 9-010 seq	$600 investigation fee per branch, $500 annual renewal fee for each location	Irrevocable letter of credit for $50k - with 2-5 branches, for $100k	Must keep books in the office; licensee to pay costs of examination	Not addressed in face of statute or other publications	Yes	Yes - first registered office MUST be in Kentucky	0	None	$500 (maximum amount of check)	14/60 days	Either	None	None
ouisiana R S § 3578.1 et seq. R.S. § 3510 et seq	$550 initial app and licensing fee, $450 annual renewal fee	$25k unencumbered cash	Must list where all books and records are kept, unless otherwise provided, must keep all records at location in state	Must have registered agent IN the state	Yes - background checks and fingerprint card	Yes	Allowed for lesser amount than original and if customer pays 25% of amount advanced plus fee	None	$350	No min/30 days max	Either	None	None
aine A M R S § 1- 01 et seq	$500 + $200 per branch application fee, plus notification fees by volume	$25k LA for each location, $50k SB	Must list location at which records are kept, if outside state, must send to state or pay travel expenses for examination	Registered agent required for service	Yes	No	No limit	None	None	No min/No max	Either	None	None

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Maryland * Md COMMERCIAL LAW Code Ann § 12-103	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Massachusetts * ALM GL ch 140, § 96	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Michigan MCLS § 487.2121 et seq.	$450 + $100 for each branch application fee, $400 license fee (initial and renewal)	$50k SB, net worth of $50k per location, maximum $250k	May keep records out of state, licensee must pay additional costs of examination if records not in state	Yes	Yes	No	0	0	$600	No min/31 days max	Either	Lender must advise customer of repayment option if customer unable to pay 8th transaction with any lender in any 12 month period	Statewide common database
Minnesota Minn. Stat. § 47.60, Minn. Stat. § 56.0001 et seq.	$500 app fee, $250 licensing fee (initial and renewal) ($250 listed by both statute and app, conflicting section of statute says $150)	LA at least $50k on site	Must keep records, costs to be paid by licensee	Not Mentioned	Biographical statements	Yes (inferred) - Must have Minnesota office	0	None	$350	No min/30 days max	Either	After maturity, contract rate must not exc 2.75% per mo. of the remaining loan proceeds calc at a rate of 1/30 of the monthly rate on the contract for each calendar day balance outstanding	None
Mississippi MS Code § 75-67-501 et seq	$750 Initial license fee, $475 renewal license fee	$10k surety bond, net worth of $20k + $5k per each additional location	May keep records out of state; licensee must pay additional costs of examination if records not in state	Not addressed in face of statute or other publications	Yes -fingerprints	Not addressed in face of statute or other publications	0	None	$400 (maximum amount of customer's check)	No min/30 days max	Either	None	None

TABLE A

	LICENSING REQUIREMENTS						LENDING RESTRICTIONS						
State/Statute	**Fees**	**Surety Bond (SB), Liquid Asset (LA) or Net Worth (NW)**	**Books and Records Req.**	**In-state Agent Req.**	**Character, Ref. Req**	**In-state Office Req.**	**Max. # Rollovers Allowed**	**Mandated Cooling-off Period between Transactions**	**Maximum Advance Amount**	**Min/Max Term**	**Check v. Cash**	**Payment Plan Option**	**Database Req.**
Missouri RSMo § 408.500 et seq	$300 (initial and renewal)	$1k surety bond	Must keep records, no specific instructions where; licensee to pay costs of examination, including travel	Not addressed in face of statute or other publications	Yes	Not addressed in face of statute or other publications	Up to 6 rollovers allowed (with a minimum of 5% of principal paid each time)	0	$500 (maximum amount of customer's check, industry wide-may rely on customer representations)	14/31 days	Either	Licensee may, without charge, extend the term of the loan beyond the due date	None
Montana MCA § 31-1-701 et seq.	$375 license application fee (initial), $125 license renewal fee	$25k LA, $10k SB	Must keep records at licensed office, costs to be paid by licensee	Not addressed in face of statute or other publications	Yes	No	Not allowed	0	$300, Cannot exceed 25% of customer's monthly net income	No min/31 days max	Either	Licensee may, without charge, extend the term of the loan beyond the due date	None
Nebraska NE Stat. § 45-901 et seq	$500 + $150 per branch application fee, $150 + $100 per branch renewal fee	$50k surety bond, $25k assets to operate business	Must keep records at principal place of business, if older than two years "at any other place within this state" so long as available for examination, costs paid by licensee	Not addressed in face of statute or other publications	Background check & Biographical Sheet	Yes Inferred (from records requirements)	Not allowed	0	$500 (maximum amount of customer's checks)	No min/31 days max	Cash	None	None
Nevada Nev. Rev. Stat Ann. § 604A.010 et seq	$400 + $100 per branch app fee, $500 pro-rated licensing fee (based on the time of year - initial only), $375 + $75 per branch renewal fee	$50k + $5k per branch SB	Records must be kept in the state or must pay travel costs for any examinations that goes out of state	Yes - must have a registered agent	Yes - Personal history & fingerprint card	Yes Inferred - Must have a Nevada principal location- may apply for out-of state branch later	Not to exceed more than 10 weeks after end of initial loan period	0	Cannot exceed 25% of customer's gross monthly income	No min/No max	Either	None	None
New Hampshire NH RSA Chapter 399-A	$450 for each branch (initial and renewal)	$25k surety bond or $25k LA per location	Records must be made available to the state (if kept in another state, must be returned to NH office or agent no more than 21 days after requested by state), costs paid by licensee	If not a NH agency, must have a registered agent, all applicants must appoint Commissioner as service agent	Yes - criminal background checks and fingerprints (unless applicant is publicly traded corporation)	No	Not Allowed	0	$500	7/30 days	Either	After the maximum term (30 days) interest shall not accrue at a greater rate than 6 percent per year	None

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New Jersey * N J Stat § 31 1-1	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
New Mexico NMSA §58-15-1 et seq	$1000 app fee, $500 license fee (initial and renewal)	bank statement for $30k	Must be kept well & made available for examination, licensee to pay costs of examination	Yes - must have a registered agent	Yes	Not addressed in face of statute or other publications	No Limit	0	$2,500	No min/No max	Either	None	None
New York # NY CLS Bank § 14-a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
North Carolina * N.C. Gen Stat §§ 24-1.1, 53-275	$250 app fee, $500 investigation fee $250 per year to renew + $50 per each addition location	$50k LA requirement	Must keep records, cost of examination born by lender	n/a	Yes	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
North Dakota ND Century Code § 13-08-01 et seq	$400 investigation fee, $450 license fee (initial and renewal)	$20k surety bond, net worth of $25k per location	Must keep records, costs to be paid by licensee	Not addressed in face of statute or other publications	Yes - fingerprint cards	Not addressed in face of statute or other publications	1 (fee may not exceed 20% of amt of rollover, 15 days min.term)	3 business days	$500	30 days (term of original transaction plus one rollover may not exceed 60 days)	Either	None	Industry-wide database
Ohio ORC § 1315.35 et seq	$1000 investigation fee if not located in Ohio + $325 or $450 licensing (depending on the month) (initial and renewal)	bank statement indicating net worth of $100k	Must indicate where all records are kept	Agent for service required	Yes - personal history & criminal history, fingerprints	Not addressed in face of statute or other publications	Not allowed	Next business day	$800	No min/6 mos max	Either	None	None

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Oklahoma 59 Okl. St § 3101 et seq	$500 investigation fee, $300 examination fee, $250 annual licensing fee per location (initial and renewal)	Net worth of $25k per location (max $250k)	Records must be made available in state. If books are kept out of state, must pay travel expenses for officers to come view them	Yes - registered agent required	Yes - personal information sheets	Not addressed in face of statute or other publications	0, renewals only	2-day cooling off period if a customer has had 6 loans in a row without at least a 7-day break between any of them, 15-day cooling off period after completion of the Repayment Plan	$500	12/45 days	Either	After deferred deposit loan and 3 consec deferred deposit loans, consumer has right to pay off 4th loan pursuant to an installment paym plan, subject to cert cond.	State mandatory third-party database
Oregon ORS Chapter 725, OAR 441-730-000 et seq	$620 initial and renewal fee	Must provide bank statements, no bond required	Must provide access to books at records at any time - licensee to pay cost of investigation	Yes - registered agent required	Yes	Not addressed in face of statute or other publications	3	Next business day (following third rollover or 3rd same day transaction)	25% of monthly net income (if net income of $60,000 or less)	No min/60 days max	Either	None	None
Pennsylvania * n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Rhode Island RI Stat. § 19-14- et seq	$275 investigation fee, $550 license fee (initial and renewal)	$10k surety bond, $25k net worth	If records kept out of state, licensee pays costs of travel and examination	Yes - registered agent required	Yes - personal history and background check	Not addressed in face of statute or other publications	1	0	$500 (maximum amount of customer's check)	13 days min/No max	Cash	None	None
South Carolina SC Stat § 34-39-110 et seq	$250 app fee, $500 investigation fee, renewal fee is $250 plus $50 per branch	Minimum net worth of $25k	Books should be kept in the offices, licensee pays cost of examination	Yes - registered agent required	Yes	Not addressed in face of statute or other publications	Not allowed	0	$300	No min/31 days max	Either	None	None

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South Dakota S D C L § 54-4-36	$600 application fee	$10k SB first license, 2.5k each additional LA requirement as well, unknown amount	If records kept out of state, licensee pays costs of travel and examination or must make the books available in state	Yes	Yes	Not addressed in face of statute or other publications	4	0	$500	None	Either	None	None
Tennessee T C A § 45-17-101 et seq.	$500 license fee per location (initial and renewal)	Minimum net worth of $25k per location, financial statements required	Records must be kept to be examined, licensee pays cost of examination	Yes	Yes	Yes - registered office must be in Tennessee	Not allowed	0	$500 (industry wide-may rely on customer's representation maximum amount of customer's check(s))	No min/31 days max	Either	None	None
Texas Tex. Finance Code § 342.007, § 342.601 et seq., § 342.251 et seq.	$200 investigation fee, $430 license fee, $40 fingerprint fee	SB $50k + $10k for each branch, net assets $25k for each office	Must maintain books that can be reviewed, cost of examination to be paid by licensee, no specification as to location	Yes - registered agent required	Yes - criminal history and fingerprints	Not addressed in face of statute or other publications	No limit	n/a	n/a	7/31 days	n/a	n/a	Not required
Utah UT Code § 7-23-101 et seq	$300 app fee	Not mentioned	Must be made available for examination, licensee to pay costs	Yes - registered agent required	Yes	No	Yes but may not be rolled over beyond 12 weeks after execution	0	None	No min/No max	Either	None	None
Vermont * n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

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Virginia VA Code § 6.1-444	$500 app fee	$10k bond per location, $50k max, $25k unencumbered liquid assets per location	Records may be kept out of state - must pay travel expenses	Yes - registered agent required	Yes - 3 references for each owner, plus background check	Yes inferred (application requires licensee to list location in Virginia will business will be conducted)	Not allowed	0	$500	7 days min/No max	Either	None	None
Washington RCW 31-45-101 et seq.	$890.10 + $345.05 for each add. location license fee, $345.05 + $172.53 for each add. location small loan endorsement fee	$10k bond + $1k for each add. branch	Must state where records will be, need permission to keep them out of state, costs paid by licensee	Registered agent required	Yes - background check and references from other states where licensed	Yes	Renewals not allowed, May not pay off loan with the proceeds from another loan	0	$700	No min/45 days max	Either	Right to repayment plan after 4th "successive" loan allowed under RCW 31.45.073(3)	None
West Virginia n/a	$750 investigation fee	Minimum capital of $10k + $2k per branch	Records can be maintained out of state, licensee must provide for examination in state or pay travel expenses to state where located	Not addressed in face of statute or other publications	Yes - background and fingerprint cards	Yes - must also be West Virginia corporation	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Wisconsin WI Stats. § 138.09	$300 investigation fee per location, $500 license fee (initial and renewal)	$5k SB per location, max of $50k, net worth $50k	Records may be kept out of state- must pay travel expenses or make available in state	Yes - registered agent for service of process required	Yes - background checks	No	No limit	0	None	No min/No max	Either	None	None
Wyoming WY Stats. § 40-14-101 et seq	$150 processing fee per location, $25 license fee per location (initial and renewal)	Not addressed in face of statute or other publications	Records may be kept out of state - must pay travel expenses or make available in state	Yes - registered agent for service of process required	Yes - personal history and references	No	Not allowed	0	None	No min/1 calendar month max	Either	None	None

* The laws of Connecticut, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Texas, Vermont and West Virginia do not have specific payday lending statutes, but may require lenders to adhere to general usury and licensing restrictions

† Georgia prohibits the making of loans under $3,000

§ New York allows payday lending by banks based in states in which payday lending is permitted